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# TENTH ANNUAL
# TENTH CIRCUIT SURVEY

# THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## CHIEF JUDGE OLIVER SETH

Judge Seth was born in New Mexico in 1915 and grew up in Santa Fe. He received his A.B. degree from Stanford University in 1937 and his LL.B. from Yale in 1940.

During World War II he served as a Major in the U.S. Army and was decorated with the Croix de Guerre. Judge Seth has been a director of the Santa Fe National Bank, chairman of the Legal Committee of the New Mexico Oil and Gas Association, and counsel for the New Mexico Cattlegrowers' Association. He has also been a regent of the Museum of New Mexico and a director of the Santa Fe Boy's Club. In 1962 he was appointed to the United States Court of Appeals for the Tenth Circuit by President John F. Kennedy. He has been Chief Judge since 1977.

## JUDGE WILLIAM J. HOLLOWAY, JR.

The son of a former Oklahoma governor, Judge Holloway was born in Hugo, Oklahoma, in 1923. He and his family moved to Oklahoma City in 1927. He served as a First Lieutenant in the Army during World War II. He then returned to complete his undergraduate studies at the University of Oklahoma, receiving his B.A. in 1947. He graduated from Harvard Law School in 1950.

In 1951 and 1952, Judge Holloway was an attorney with the Department of Justice in Washington, D.C. Afterwards, he returned to private practice in Oklahoma City where he was appointed to the Tenth Circuit by Lyndon B. Johnson. He is a member of Phi Beta Kappa and Phi Gamma Delta.

## JUDGE ROBERT H. McWILLIAMS

Judge McWilliams was born in Salina, Kansas in 1916 and moved to Denver in 1927 where he has lived ever since. He received his A.B. and LL.B. degrees from the University of Denver. In 1971, he was awarded an Honorary Doctor of Law degree from the University.

During World War II, Judge McWilliams served in the United States Army and was with the Office of Strategic Services. He has served as a Deputy District Attorney, a Colorado district court judge, and was a member of the Colorado Supreme Court for nine years prior to his appointment to the Court of Appeals.

Judge McWilliams is a member of the Judicial Conference Committee on the Administration of the Criminal Law, Phi Beta Kappa, Omicron Delta Kappa, Phi Delta Phi, and Kappa Sigma. He was sworn in as a Judge of the United States Court of Appeals for the Tenth Circuit in 1970.

## JUDGE JAMES E. BARRETT

The son of the late Frank A. Barrett, who served as Wyoming's Congressman, Governor, and U.S. Senator, Judge Barrett was born in 1922 in Lusk, Wyoming. He attended the University of Wyoming for two years prior to his service in the Army during World War II. After the War, he attended Saint Catherine's College at Oxford University. He received his LL.B. from the University of Wyoming in 1949. In 1973 he was given the Distinguished Alumni Award from his alma mater.

Prior to his appointment, Judge Barrett had been involved in private practice in Lusk and had served as County and Prosecuting Attorney for Niobrara County; Town Attorney for the towns of Lusk and Manville; and attorney for the Niobrara County Consolidated School District. In 1967 he was appointed by Governor Stanley K. Hathaway to serve as Wyoming Attorney General and he remained in that position until 1971.

Judge Barrett is a member of the Judicial Conference Subcommittee on Federal Jurisdiction, the U.S. Foreign Intelligence Surveillance Court of Review, and is a trustee of Saint Joseph's Children's Home. He was appointed to the Court in 1971.

## JUDGE WILLIAM E. DOYLE

Judge Doyle was born in Denver in 1911 and received his A.B. from the University of Colorado in 1940. He obtained his LL.B. and J.D. degrees from George Washington University. He served as Deputy District Attorney for Denver from 1938 until 1941, a Colorado district court judge in 1948 and 1949, and Chief Deputy District Attorney from 1949 until 1952. During 1959-61 he was a Justice on the Colorado Supreme Court.

Judge Doyle has been a Visiting Professor of Law at the University of Colorado and a Professor of Law at the Westminster College of Law (University of Denver College of Law) in Denver. He is a former Chairman of the Judicial Conference Committee to Implement the Magistrates' Act and is presently a member of the Judicial Conference Committee on the Administration of the Bankruptcy System. He is a member of the Order of the Coif, the Order of Saint Ives, Pi Sigma Alpha, and Phi Alpha Delta.

He was appointed to the Tenth Circuit Court of Appeals in 1971 following ten years as a United States District Judge for the District of Colorado.

## JUDGE JAMES K. LOGAN

Judge Logan was born in Quenemo, Kansas, in 1929. He received his A.B. from the University of Kansas in 1952 and was graduated *magna cum laude* from Harvard Law School in 1955. He went on to be U.S. Circuit Judge Walter Huxman's law clerk in 1956 and then practiced with the Los Angeles firm of Gibson, Dunn & Crutcher. He became Dean of the University of Kansas Law School in 1961 and served in the capacity until 1968.

Since 1961 he has been a visiting professor at Harvard Law School, The University of Texas Law School, Stanford University, and the University of Michigan. He was a commissioner for the U.S. District Court from 1964 until 1967 and was a candidate for the U.S. Senate in 1968.

Judge Logan is a Rhodes Scholar, a member of Phi Beta Kappa, Order of the Coif, Beta Gamma Sigma, Omicron Delta Kappa, Pi Sigma Alpha, Alpha Kappa Psi, and Phi Delta Phi. He has co-authored numerous books on estate planning and administration. In 1977 he was appointed to the United States Court of Appeals for the Tenth Circuit.

## JUDGE MONROE G. McKAY

Judge McKay was born in Huntsville, Utah, in 1929 and lives in Provo. He graduated from Brigham Young University in 1957 with high honors. He received his J.D. from the University of Chicago and became the law clerk for Justice Jesse A. Udall of the Arizona Supreme Court in 1960. From 1961 to 1974, Judge McKay was with the firm of Lewis and Roca in Phoenix, taking two years out to serve as Director of the United States Peace Corps in Malawi, Africa. He was a law professor at Brigham Young University from 1974 until he was appointed to the Tenth Circuit Court of Appeals in 1977.

## JUDGE STEPHANIE K. SEYMOUR

Judge Seymour was born in Battle Creek, Michigan, in 1940. She graduated from Smith College, *magna cum laude*, in 1962 and earned her J.D. from Harvard Law School in 1965. She was admitted to the Oklahoma bar in 1965.

Judge Seymour has practiced law in Boston, Massachusetts, 1965-1966; in Tulsa, Oklahoma, 1967; and Houston, Texas, 1968-1969. Most recently, she has practiced with the Tulsa firm of Doerner, Stuart, Saunders, Daniel & Anderson from 1971 to 1979. Judge Seymour is a member of Phi Beta Kappa, and the American, Oklahoma, and Tulsa County Bar associations. She served as a bar examiner from 1973 through 1979.

Judge Seymour was appointed to the United States Court of Appeals for the Tenth Circuit by President Carter in 1979.

## SENIOR JUDGE JOHN C. PICKETT

Judge Pickett was born in Ravenna, Nebraska, in 1896. He received his LL.B. degree from the University of Nebraska in 1922. In 1920, he was a pitcher for the Chicago White Sox. During World War I, he served as a Second Lieutenant.

From 1935 until 1949, Judge Pickett was Assistant United States Attorney for the District of Wyoming; in 1949, he was United States Attorney. He is a past member of the Judicial Conference and has served as Chairman of the Judicial Conference Advisory Committee on the Administration of the Criminal Law.

Judge Pickett was appointed to the United States Court of Appeals for the Tenth Circuit in 1949 and has been a Senior Judge since January 1, 1966.

## SENIOR JUDGE DELMAS C. HILL (Retired)

Judge Hill was born in Wamego, Kansas, in 1906. He received his LL.B. from Washburn College in 1929. From 1929 to 1943 he practiced law in Wamego, serving as an Assistant U.S. Attorney from 1934 to 1936. He was general counsel for the Kansas State Tax Commission from 1937 to 1939 and Chairman of the State Democratic Committee from 1946 to 1948. During World War II he was a Captain in the U.S. Army. In 1945, he assisted in the prosecution of General Yamashita in Manila. He was a U.S. District Judge from 1949 until 1961 when he was appointed to the Tenth Circuit Court of Appeals. Judge Hill became a Senior Judge on April 1, 1977.

## SENIOR JUDGE JEAN S. BREITENSTEIN

Judge Breitenstein was born in Keokuk, Iowa, in 1900. His family moved to Boulder, Colorado, in 1907. After graduation from the University of Colorado, where he received his A.B. in 1922 and LL.B. in 1924, he served as a Colorado Assistant Attorney General from 1925 until 1929. He was an Assistant United States Attorney from 1930 until 1933. Between 1933 and 1954, he practiced law in Denver. In 1954, he became a United States District Judge.

Judge Breitenstein has served as Chairman of the Judicial Conference Committee on Intercircuit Assignments and is a past president of the Denver Law Club.

A member of Phi Beta Kappa, Order of the Coif, and Phi Alpha Delta, Judge Breitenstein holds LL.D. degrees from the University of Colorado and the University of Denver. He was appointed to the Tenth Circuit Court of Appeals in 1957 and became a Senior Judge on July 31, 1970.

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# ADMINISTRATIVE LAW

## OVERVIEW

Just after the close of the survey period, the United States Supreme Court decided *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*.[1] *Baltimore Gas & Electric* is significant for two reasons. First, it is the final pronouncement by the Supreme Court in the litigation concerning the validity of the Nuclear Regulatory Commission (NRC) rule that was the subject of the landmark administrative law case *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*.[2] Second, while *Baltimore Gas & Electric* did not make any profound change in administrative jurisprudence, it is a contemporary Supreme Court reaffirmation of the philosophy announced in *Vermont Yankee*: the fundamental principle guiding judicial review of administrative action must be one of deference. As long as a federal agency complies with substantive and procedural statutory requirements, a reviewing court must defer to agency decisionmaking even when "the court is unhappy with the result reached."[3]

The Tenth Circuit did not deviate from this general rule of judicial deference during the survey period. The court decided thirty cases involving review of agency decisionmaking, and in only three of these cases did the Tenth Circuit directly reverse an agency decision.[4] One of these three cases was especially important because the Tenth Circuit, apparently for the first time, permitted the estoppel doctrine to be used against the federal government.[5]

This survey considers the estoppel case in some detail because of its novelty. Another Tenth Circuit decision, which considers the propriety of generic rulemaking, is also given considerable treatment. The case, *United States v. Thompson*,[6] concerned the attempt of antinuclear demonstrators to use an administrative law defense to avoid criminal prosecution under a federal antitrespassing statute. The third case given in-depth treatment involved the creation of an exception to the primary jurisdiction doctrine.[7] Other administrative law cases reviewed for this survey deal primarily with judicial review of agency action, and are given less extensive treatment. Un-

1. 103 S. Ct. 2246 (1983).

2. 435 U.S. 519 (1978).

3. 103 S. Ct. at 2252 (quoting *Vermont Yankee*, 435 U.S. at 555).

4. *See* Home Savings & Loan Ass'n v. Nimmo, 695 F.2d 1251 (10th Cir. 1982) (for discussion *see infra* notes 75-157 and accompanying text); Broadbent v. Harris, 698 F.2d 407 (10th Cir. 1983) (per curiam) (for discussion *see infra* notes 158-66 and accompanying text); Cavitt v. Schweiker, 704 F.2d 1193 (10th Cir. 1983) (for discussion *see infra* notes 167-71 and accompanying text).

5. Home Savings & Loan Ass'n v. Nimmo, 695 F.2d 1251 (10th Cir. 1982).

6. 687 F.2d 1279 (10th Cir. 1982). For discussion of this case *see infra* notes 8-75 and accompanying text.

7. Mountain States Natural Gas Corp. v. Petroleum Corp. of Texas, 693 F.2d 1015 (10th Cir. 1983). For discussion of this case see *infra* notes 198-236 and accompanying text.

published decisions, and published decisions of little precedential impact, are omitted from this article.

## I. GENERIC RULEMAKING AND JUDICIAL DEFERENCE: *UNITED STATES V. THOMPSON*

### A. *The Case in Context*

Probably the most notable administrative law case decided by the Tenth Circuit during this survey period was *United States v. Thompson*,[8] a four to three en banc decision. *Thompson* upheld federal trespassing convictions against antinuclear demonstrators at Rocky Flats (a nuclear weapons manufacturing facility),[9] rejecting the demonstrators' assertion that their convictions were invalid because the Department of Energy (DOE) did not conduct rulemaking proceedings prior to designating the trespass area off-limits.[10] In so doing, the Tenth Circuit en banc reversed a previous Tenth Circuit which had found the convictions invalid.[11]

The issue in *Thompson* was whether DOE could rely upon a generic rulemaking,[12] promulgated two decades earlier pursuant to 42 U.S.C. § 2278a,[13] as a sufficient basis for designating the area where the demonstrators were arrested as off-limits. Important to this article's analysis, generic rulemaking issues were also treated in the landmark *Vermont Yankee* decision and its sequel, *Baltimore Gas & Electric*.[14]

*Vermont Yankee* established a judicial policy against imposing procedural requirements on agencies[15] in addition to the bare minimum prescribed by either the organic statute[16] or the Administrative Procedure Act (APA).[17] This policy has been criticized as a major setback in the development of administrative jurisprudence because it potentially destroys an entire body

8. 687 F.2d 1279 (10th Cir. 1982).

9. *Id.* at 1286.

10. *Id.*

11. *See* United States v. Seward, No. 79-1711 (10th Cir. Jan. 5, 1981), *rev'd sub nom.* United States v. Thompson, 687 F.2d 1279 (10th Cir. 1982)(en banc).

12. A generic rulemaking sets out the regulatory principles or procedures which will control a class of subsequent administrative actions.

13. 42 U.S.C. § 2278a (1976). Relevant section 2278a regulations are found at 10 C.F.R. §§ 860.1-.8 (1983).

At the time the regulations were promulgated, the Atomic Energy Commission was the agency authorized to implement section 2278a. This authority is now vested in DOE. *See* 42 U.S.C. § 7151 (Supp. V 1981) (listing powers assumed by DOE). *See also* 687 F.2d at 1286 n.2 (McKay, J., dissenting) (tracing source of DOE power under section 2278a).

14. The issue in *Thompson*, in essence, was whether a generic rulemaking could be used to implement the provisions of section 2278a. In *Vermont Yankee* and *Baltimore Gas & Elec.* the issue was whether adoption of the generic rulemaking approach constituted an abuse of discretion. As discussed below, the majority in *Thompson* should have decided the case by evaluating the validity of the initial generic rulemaking as was done in *Vermont Yankee* and *Baltimore Gas & Elec.* *See infra* notes 37-64 and accompanying text.

15. Justice Rehnquist, writing for the majority, stated: "Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them." 435 U.S. at 524.

16. "Organic statute," when referred to in this article, means the statute authorizing agency action.

17. 5 U.S.C. §§ 551-706 (1982).

of judge-made administrative common law.[18] Nonetheless, *Baltimore Gas & Electric* sustains the policy of deference established by *Vermont Yankee*.[19] Accordingly, the Tenth Circuit's *Thompson* decision (which rejects an attempt to require DOE to engage in rulemaking not specifically required by organic statute or APA) is in harmony with the policy of deference established by the Supreme Court.

The Tenth Circuit did not, however, resolve the rulemaking issue in *Thompson* by employing an analysis similar to that used in *Vermont Yankee* and *Baltimore Gas & Electric*, where the Court focused on whether the generic implementing regulation conformed with the controlling statute.[20] The Tenth Circuit instead became embroiled in a debate over the significance of designating the additional property as off-limits, and accordingly failed to focus on whether DOE's actions were taken pursuant to a valid generic rule.[21] As a result, Judge McKay's forcefully stated dissent[22] is more persuasive than it should have been. The remainder of this comment analyzes the *Thompson* opinions based upon a generic rulemaking approach.

### B. *Statement of the Case*

The dispute in *Thompson* stemmed from an attempt by antinuclear demonstrators to use a technical administrative law defense to overturn their criminal convictions for trespassing at Rocky Flats.[23] The demonstrators were arrested for violating 42 U.S.C. § 2278a,[24] a federal statute prohibiting

18. *See, e.g.*, 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 6:36-:37 (2d ed. 1979).

19. *Baltimore Gas & Elec.*, 103 S. Ct. at 2252. The trend towards greater judicial deference to the executive branch in the area of administrative law, beginning with *Vermont Yankee*, is reinforced by the recent Supreme Court decision holding that the legislative veto is unconstitutional. *See* INS v. Chadha, 103 S. Ct. 2764 (1983).

20. *Baltimore Gas & Elec.*, 103 S. Ct. at 2251-52; *Vermont Yankee*, 435 U.S. at 524.

21. *See infra* notes 25-30 and accompanying text.

22. United States v. Thompson, 687 F.2d at 1286 (McKay, J., dissenting).

23. The Rocky Flats Nuclear Plant Site, located in Jefferson County, Colorado, is owned by the Department of Energy and operated by Rockwell International, a private contractor. United States v. Seward, 687 F.2d 1270 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 789 (1983) (companion case to *Thompson* dealing with another group of Rocky Flats demonstrators arrested the same day). A number of other cases dealing with the same illegal demonstration were disposed of by the *Seward* and *Thompson* decisions. *See* United States v. Adams, 687 F.2d 1318 (10th Cir. 1982); United States v. Grodsky, 687 F.2d 1317 (10th Cir. 1982); United States v. Ellsberg, 687 F.2d 1316 (10th Cir. 1982) United States v. Rolfe, 687 F.2d 1315 (10th Cir. 1982) *cert. denied*, 103 S. Ct. 790 (1983); United States v. Ficurra, 687 F.2d 1314 (10th Cir. 1982); United States v. Gruber, 687 F.2d 1313 (10th Cir. 1982); United States v. Stewart, 687 F.2d 1312 (10th Cir. 1982); United States v. Hueftle, 687 F.2d 1305 (10th Cir. 1982); United States v. Dukehart, 687 F.2d 1301 (10th Cir. 1982); United States v. Grose, 687 F.2d 1298 (10th Cir. 1982); United States v. Peters, 687 F.2d 1295 (10th Cir. 1982).

24. 42 U.S.C. § 2278a (1976) provides:

> (a) The Commission is authorized to issue regulations relating to the entry upon or carrying, transporting, or otherwise introducing or causing to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon any facility, installation, or real property subject to the jurisdiction, administration, or in the custody of the Commission. Every such regulation of the Commission shall be posted conspicuously at the location involved.
>
> (b) Whoever shall willfully violate any regulation of the Commission issued pursuant to subsection (a) of this section shall, upon conviction thereof, be punishable by a fine of not more than $1,000.
>
> (c) Whoever shall willfully violate any regulation of the Commission issued pur-

unlawful entry onto federal, nuclear-related facilities.[25] Several of the demonstrators were arrested in an area designated off-limits pursuant to this federal statute only sixteen days prior to the arrests.[26] These demonstrators claimed their arrests were invalid because no rulemaking proceeding was conducted prior to the designation,[27] as allegedly required by the APA.[28]

DOE apparently argued that an additional rulemaking proceeding was unnecessary because the designation was proper based upon earlier generic regulations implementing section 2278a.[29] These regulations, properly adopted in 1963 pursuant to the APA,[30] require only two acts in order to designate an area as off-limits: 1) publishing notice of the designation in the Federal Register,[31] and 2) posting the affected area with notices setting forth the prohibitions.[32] Because DOE's designation of the arrest area satisfied both of these requirements, the majority held that section 2278a was validly applied to the demonstrators.[33]

The dissent, written by Judge McKay and joined by Judges Seymour and Logan, essentially characterized DOE's argument as an agency's attempt to use its own regulations to circumvent the public protections provided by the notice and comment provisions of the APA.[34] The dissent's position was that the designation of the additional property was a "rule" as defined by the APA.[35] DOE was therefore required to follow the notice and comment procedures of the APA prior to the designation; having failed to do so, the off-limits designation was null and void, with the result that the convictions were similarly invalid.[36]

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suant to subsection (a) of this section with respect to any installation or other property which is enclosed by a fence, wall, floor, roof, or other structural barrier shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both.

Power to act pursuant to this statute is now vested in DOE. *See supra* note 13.

25. *Id. See also* S. REP. NO. 2530, 84th Cong., 2d Sess. 5, *reprinted in* 1956 U.S. CODE CONG. & AD. NEWS 4426, 4430.

26. *Thompson*, 687 F.2d at 1281-83. The designation was made on April 13, 1979. 44 Fed. Reg. 22,145 (1979). The demonstrators were arrested on April 29, 1979. 687 F.2d at 1281.

27. *See* United States v. Seward, No. 79-1711 (10th Cir. Jan. 5, 1981), *rev'd sub nom*. United States v. Thompson, 687 F.2d 1279 (10th Cir. 1982) (en banc).

28. *Id.* Section 4 of the APA (codified as amended at 5 U.S.C. § 553 (1982)), requires an agency proposing to adopt substantive rules to publish notice of the proposed rule in the Federal Register at least 30 days prior to the rule's proposed effective date. 5 U.S.C. § 553(b)-(d) (1982). Exemptions are found when the rule involves military affairs or the management of public property, *id.* § 553(a), or when exigencies justify circumventing the notice and comment requirements. *Id.* § 553(b)(B).

For more background on the defendant's original administrative challenges of their conviction and the initial decision by the Tenth Circuit, see *Administrative Law, Eighth Annual Tenth Circuit Survey*, 59 DEN. L.J. 174-76 (1982).

29. 687 F.2d at 1281-82. The regulations implementing section 2278a are codified at 10 C.F.R. §§ 860.1-.8 (1983).

30. 687 F.2d at 1282.

31. 10 C.F.R. § 860.7 (1983).

32. *Id.*

33. 687 F.2d at 1281-83.

34. According to the dissent: "An agency should not be permitted to exempt itself from the congressionally mandated requirements of the APA through its own regulation." *Id.* at 1291 (McKay, J., dissenting).

35. *Id. See also* 5 U.S.C. § 551(4) (1982) (defining rule to include agency statements designed to interpret or prescribe law).

36. 687 F.2d at 1291-95 (McKay, J., dissenting).

C. *The Majority Opinion: A Critique*

The majority opinion failed to show persuasively why the designation of the additional land as off-limits was proper. While the majority initially recognized the generic nature of the section 2278a regulations,[37] the majority's analysis consisted primarily of attempts to minimize the importance of the additional designation.[38] The majority did not clearly state that the generic implementing regulation was a legislative rule, nor did the majority articulate that because the regulation was a legislative rule the scope of the court's review was narrow, limited to determining whether the rule was arbitrary or capricious.[39] Only in one short paragraph did the majority address whether the generic implementing regulation was legislative or interpretative.[40] The majority cited *Skidmore v. Swift & Co.*[41] for the proposition that the generic regulation was the only rulemaking necessary to implement the statute.[42] Reliance upon *Skidmore* is difficult to understand, however, because *Skidmore* stands for the proposition that interpretative rules, although not controlling upon the courts, nonetheless provide guidance that a reviewing court may follow.[43] The generic implementing regulation at issue in *Thompson*, however, is clearly legislative in character.[44] If the majority had focused on characterizing the generic implementing regulation as a legislative rule subject to limited review, the conclusion that DOE's designation was proper would have been more persuasive.

In the same short paragraph where the *Skidmore* citation appears the Tenth Circuit cites *Batterton v. Francis*[45] which, unlike *Skidmore*, deals specifically with the legal significance of legislative rules. *Batterton* stands for the proposition that if Congress delegates legislative rulemaking authority to an agency, judicial review of the agency's legislative rules is limited to an investigation of whether the rules are arbitrary or capricious and are therefore in excess of delegated authority,[46] or whether the agency has arbitrarily ap-

37. *Id.* at 1282-83.

38. For example, the majority characterized the designation as being merely ministerial, *id.* at 1285, and argued that the regulations had been promulgated under the "management of government property" exception to the APA's rulemaking requirements. *Id. See* 5 U.S.C. § 553(a)(2) (1982).

39. *Cf.* Batterton v. Francis, 432 U.S. 416, 425-26 (1977) (review of legislative regulations duly promulgated pursuant to APA limited to inquiry into whether regulations are arbitrary or capricious and therefore in excess of delegated authority).

40. 687 F.2d at 1284. For an overview of the significance of the legislative-interpretative distinction, see 2 K. DAVIS, *supra* note 18, at § 7:8.

41. 323 U.S. 134 (1944).

42. 687 F.2d at 1284.

43. 323 U.S. at 140. *See also* 2 K. DAVIS, *supra* note 18, at § 7:10.

44. Section 2278a specifically authorized the Atomic Energy Commission to promulgate regulations to implement the statute. (Authority to act pursuant to those regulations was later transferred to DOE. *See supra* note 13). Specific statutory authorization to promulgate regulations is generally treated as a delegation of authority to promulgate legislative regulations. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 301-03 (1979); 2 K. DAVIS, *supra* note 18, at § 7:8. Additionally, section 2278a(b) provides that violations of regulations issued pursuant to section 2278a will be punishable, clearly indicating congressional delegation of lawmaking power. *See supra* note 24.

45. 432 U.S. 416 (1977).

46. *Id.* at 425-26.

plied the rule.[47] Accordingly, DOE's action could only be set aside upon a showing that use of a generic implementing regulation was an arbitrary or capricious interpretion of section 2278a, or upon a showing that the regulations had been arbitrarily applied.

Section 2278a was enacted to assist in protecting nuclear facilities against security dangers created by unauthorized entry.[48] The Senate report accompanying the statute plainly stated that the authority conferred would be standby authority.[49] Section 2278a manifests this congressional intent to create agency discretion in controlling application of the antitrespassing law: the only limitation section 2278a places on agency discretion in promulgating regulations is the requirement that notice of designation be posted.[50] Given the scope of agency discretion and the standby nature of agency authority, use of a generic implementing regulation does not appear to be an "arbitrary and capricious" interpretation of the statute. Given the absence of any allegation that the section 2278a regulations were arbitrarily applied to the Rocky Flats demonstrators, and in light of the limited scope of judicial review, the agency's designation was clearly lawful.

Perhaps the reason the Tenth Circuit majority chose to focus its analysis on the designation rather than the validity of the implementing regulation was to refute the demonstrators' argument based upon *Joseph v. United States Civil Service Commission*.[51] At issue in *Joseph* was a regulation,[52] promulgated by the United States Civil Service Commission (Commission), which exempted government employees in certain cities from the Hatch Act.[53] The Commission attempted to add the District of Columbia to the list of exempt cities without engaging in the notice and comment rulemaking procedures mandated by the APA.[54] When this action was challenged, the Commission argued that the amendment was an "interpretative" rule and that rulemaking proceedings were therefore not required to add the District of Columbia to the list.[55] The District of Columbia Circuit disagreed, finding that because the Commission's actions involved promulgation of legislative rules, rulemaking proceedings were required prior to adding a city to the list.[56]

The majority in *Thompson* attempted to distinguish *Joseph* on its facts.[57] The dissent, on the other hand, considered the situation in *Thompson* a "close

47. *See* 5 U.S.C. § 702 (1982) (providing for judicial review of wrongful agency action).

48. S. REP. NO. 2530, 84th Cong., 2d Sess. 5, *reprinted in* 1956 U.S. CODE CONG. & AD. NEWS 4426, 4430.

49. *Id.*

50. *See* 42 U.S.C. § 2278a(a) (1976).

51. 554 F.2d 1140 (D.C. Cir. 1977).

52. 5 C.F.R. § 733.124(c) (1984).

53. 5 U.S.C. §§ 7321-7328 (1982). The Hatch Act is designed to prevent federal employees from actively engaging in political campaigns. *See* United Pub. Workers v. Mitchell, 330 U.S. 75 (1947). The Civil Service Commission is authorized to create specified exemptions to the Hatch Act. 5 U.S.C. § 7327(b) (1982) (as amended).

54. 554 F.2d at 1152.

55. *Id.* at 1152-53.

56. *Id.*

57. The majority stated: "The point is, of course, that something entirely new, a new city, was added in *Joseph* which had not been considered before. This is quite different from the case before us where all [facilities subject to designation] had been considered before . . . and the regulation applied to all." 687 F.2d at 1284.

comparison"[58] to the situation in *Joseph* and found the reasoning applied in *Joseph* to be "directly applicable" to *Thompson*.[59] Noticeably absent in either the majority's or the dissent's treatment of *Joseph* was a comparison between the statutes at issue in *Joseph* and *Thompson*. Comparison of the two statutes shows that the analysis used in *Joseph* was not appropriate for *Thompson*, making *Joseph* inapposite.

The statute at issue in *Joseph* gave discretionary rulemaking authority to the Commission to promulgate rules exempting government employees in certain cities from restrictions imposed by the Hatch Act.[60] Before the Commission could make such an exemption, however, the statute required the Commission to make two findings vital to the statutory purpose: 1) the municipality was in either Maryland or Virginia or a "majority of the voters are employed by the Government of the United States";[61] *and* 2) special or unusual circumstances existed making an exemption in the "domestic interest" of the employees or individuals in the particular municipality.[62] These two statutorily required findings must be made for each municipality to be exempted from the Hatch Act. Therefore, given the statutory requirements, an individual rulemaking proceeding was necessary to create the record necessary to ensure that the Commission had not exceeded its authority, abused its discretion, or acted arbitrarily or capriciously in granting an exemption.

The statute in *Thompson* presents a different situation because there are no such statutorily prescribed preconditions which must be evaluated in order to effectuate the statute. All that is *required* of an agency enforcing section 2278a is to provide the detail on where and how the statute will be enforced.[63] Given this much authorized agency discretion, a generic rulemaking that provides this detail satisfies the requirements of the APA. The majority missed an important point by failing to analyze the very different statutory requirements imposed in each case. In *Joseph*, a rulemaking proceeding was needed to make a record sufficient to substantiate important statutorily required findings.[64] In *Thompson*, however, the generic regulation

58. *Id.* at 1292 (McKay, J., dissenting).

59. *Id.* The *Joseph* court reasoned that because a declaration of exemption was binding on a court, and because only legislative regulations can bind courts, the declaration of exemption was a legislative rule subject to the APA's notice and comment requirements. 554 F.2d at 1152-53. Judge McKay reasoned that because an off-limits designation was binding on a court, *Joseph*'s legislative rule rationale required notice and comment proceedings for all designations. 687 F.2d at 1293-93 (McKay, J., dissenting).

60. The statute interpreted in *Joseph* reads: "The Office of Personnel Management [formerly the Civil Service Commission] . . . may prescribe regulations permitting employees and individuals [covered by the Hatch Act] . . . to take an active part in political management and political campaigns involving the municipality or other political subdivisions in which they reside." 5 U.S.C. § 7327(b) (1982).

61. 5 U.S.C. § 7327(b)(1) (1982). In *Joseph*, the Court determined that the first part of the regulation applied to the geographical areas adjacent to Washington, D.C., but not to Washington, D.C. itself. 554 F.2d at 1154-55. A regulation which exempted the District of Columbia from the Hatch Act could therefore only be valid if a majority of the voters within the District of Columbia worked for the government of the United States. *Id.* at 1155.

62. 5 U.S.C. § 7327(b)(2) (1982).

63. *See supra* note 25 (full text of section 2278a).

64. The importance of a rulemaking record to support an exemption is shown by the District of Columbia Circuit's conclusion that the then-existing record was inadequate to sustain a

detailing how the statute was going to be implemented satisfied the statutory mandate.

D. *The Dissent*

By concentrating on the designation itself rather than the nature of the implementing regulation and the proper scope of review, the majority unnecessarily provided the dissent with a basis for its analysis. The dissent highlighed the significant impact the designation had upon the demonstrators, turning a political protest previously free from federal strictures into a federal crime.[65] The majority's brief generic regulation discussion was criticized as allowing an agency to circumvent the APA's procedural protections.[66] Given the more than interpretative nature of these regulations and the significant power they conferred, policy considerations required application of the APA absent a specific statutory exemption.[67] Essentially, the dissenter believed that permitting the agency to rely upon the earlier generic rulemaking provided the agency with an opportunity to abuse its authority.[68]

E. *Summation*

The antitrespassing statute in *Thompson* gave DOE the authority to promugate legislative rules.[69] Judicial review of those rules and any action taken pursuant thereto is limited to investigating whether the agency has acted arbitrarily or capriciously.[70] Section 2278a required only that agency rules detail how the statute would be administered. The generic implementing regulation promulgated by DOE appears to satisfy this statutory concern. Accordingly, the generic implementing regulation is a valid legislative rule. As such, use of a generic implementing regulation which allows additional land to be made off-limits merely by posting the appropriate signs and publishing a notice in the Federal Register,[71] is a sound exercise of the

finding that the majority of the voters in the District of Columbia were employees of the United States government. 554 F.2d at 1157.

65. Probably the best summary of the dissent's position is the following:

> [S]ince we deal with a difficult question in the murky field of administrative lawmaking, interpretation, and administration, I believe that any doubt about the APA's applicability ought to be resolved in favor of requiring the debate and justification procedures of APA § 553. This canon of construction is all the more urgent in the context of this case where the inevitable consequence of the DOE's hasty actions is to turn otherwise innocent behavior into criminal behavior. A further reason to follow this canon of construction in this case is the real, and not fancied, ambient presence of first amendment values.

687 F.2d at 1288 (McKay, J., dissenting).

66. *Id.* at 1291.

67. *Id.* The policy basis of the dissent's position is revealed by the statement that an agency "*should not be* permitted to exempt itself" from the APA. *Id.* (emphasis supplied).

68. The dissent appears to have taken the following admonition of Kenneth Davis to heart: "Probably every court should be alert to miss no opportunity to contribute to achievement of the ideal that every affected person should have opportunity to participate in administrative policy making." 2 K. DAVIS, *supra* note 18, at § 7:6. *See* 687 F.2d at 1293-94 (McKay, J., dissenting).

69. *See supra* note 44.

70. *See supra* notes 45-47 and accompanying text.

71. 10 C.F.R. §§ 860.1-.8 (1983).

agency's discretion.[72]

The majority's opinion in *Thompson* was confusing and unpersuasive because it focused on the designation of the additional land as off-limits, rather than classifying the implementing regulation and delineating the proper scope of review. The dissent, although raising valid concerns about the potential abuse of generic rulemaking, is incorrect in light of the relevant authorizing statute and its legislative history.[73] The Supreme Court's pronouncements in *Vermont Yankee* and *Baltimore Gas & Electric* effectively ended the era in which the courts could subject agency rulemaking to procedural requirements not imposed by the applicable organic statute or by the APA. *Thompson*, even though its analysis can be faulted, demonstrates that the Tenth Circuit's approach to administrative rulemaking follows that of the Supreme Court.

## II. ESTOPPEL AGAINST THE GOVERNMENT IN COMMERCIAL TRANSACTIONS

### A. *Overview of Estoppel Against the Government*

In 1961, the Tenth Circuit for the first time recognized, in dictum, that estoppel might lie against the federal government.[74] Chief Judge Murrah, writing for the court, stated that despite the strong policy against allowing estoppel to be asserted against the government, "we will not allow the government to deal dishonestly or capriciously with its citizens. It must not play an ignoble part or do a shabby thing."[75] It has taken over two decades, however, for the Tenth Circuit to use the estoppel doctrine against the government. In *Home Savings & Loan Association v. Nimmo*,[76] a 1982 case, the Tenth Circuit held that the federal government was estopped. Even then, the decision was not unanimous.[77]

The issue of whether equitable estoppel can be invoked against the government has caused considerable controversy.[78] The issue appeared to have been put to rest in 1947 when Justice Frankfurter, in *Federal Crop Insurance Corp. v. Merrill*,[79] roundly rejected the notion that the federal government could be equitably estopped.[80] Since *Merrill*, however, the concept has refused to die.[81] The Ninth Circuit, for example, has taken a leading role in

72. This conclusion is supported by Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 103 S. Ct. 2246 (1983), which approved the use of a generic regulation by the Nuclear Regulatory Commission.

73. *See supra* notes 48-64 and accompanying text.

74. Massaglia v. Commissioner, 286 F.2d 258, 262 (10th Cir. 1961).

75. *Id.*

76. 695 F.2d 1251 (10th Cir. 1982).

77. *See id.* at 1255 (McKay, J., dissenting).

78. *See, e.g.*, Hansen v. Harris, 619 F.2d 942 (2d Cir. 1980), *rev'd sub nom.* Schweiker v. Hansen, 450 U.S. 785 (1981) (issue discussed by both Judge Oakes, writing for the majority, and by Judge Newman, in a concurrence).

79. 332 U.S. 380 (1947).

80. Justice Frankfurter stated: "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Id.* at 384.

81. An article discussing collateral estoppel in administrative proceedings quotes a passage

recognizing the estoppel doctrine in cases involving the government.[82] Regardless of how strongly the Supreme Court has disapproved of the use of equitable estoppel against the government,[83] the doctrine survives, although it by no means flourishes.[84]

In light of the Court's recent rejection of government estoppel in *Schweiker v. Hansen*,[85] the *Home Savings* decision, which recognizes a claim of estoppel against the government, is a major development and a major step within the Tenth Circuit.[86] Further, because of the analysis used by the Tenth Circuit, *Home Savings* appears to be at the cutting edge of a post-*Hansen* trend. The majority ruled that the government could be estopped in this case because the dispute involved a "commercial transaction."[87] In so doing, the Tenth Circuit joined the Seventh Circuit[88] and the Ninth Circuit[89] in relying on the private/commercial or proprietary/sovereign distinction to avoid the prohibition against using estoppel against the government.[90]

B. *Statement of the Case*

A lending institution loaned a couple $34,000 to buy a house. The loan

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from Shakespeare's *Measure For Measure* in order to characterize the state of the equitable estoppel doctrine as it relates to the government: "The law hath not been dead, though it hath slept." Mogel, *Res Judicata and Collateral Estoppel in Administrative Proceedings*, 30 BAYLOR L. REV. 463, 463 (1978) (quoting W. SHAKESPEARE, MEASURE FOR MEASURE, Act II, Scene 2, line 90).

82. *See, e.g.*, Villena v. INS, 622 F.2d 1352 (9th Cir. 1980); Oki v. INS, 598 F.2d 1160 (9th Cir. 1979); Santiago v. INS, 526 F.2d 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

83. The Court recently rejected an opportunity to resolve the issues raised by circuit court recognition that estoppel may be available against the federal government. *See* Schweiker v. Hansen, 450 U.S. 785 (1981).

84. *See* Parcel, *Making the Government Fight Fairly: Estopping the United States*, 27A ROCKY MTN. MIN. L. INST. 41 (1982); Note, *Equitable Estoppel of the Government*, 79 COLUM. L. REV. 551 (1979); *see also* 4 K. DAVIS, *supra* note 18, at § 20:6 (2d ed. 1983).

85. 450 U.S. 785 (1981). *Hansen* rejected a claim of estoppel, but did not categorically reject estopping the government. *See id.* at 790.

86. The Tenth Circuit has reviewed several cases dealing with the issue of estoppel against the government, rejecting the estoppel claim in each. *See* Sweeten v. USDA, 684 F.2d 679 (10th Cir. 1982); United States v. Browning, 630 F.2d 694 (10th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981); Albrechtsen v. Andrus, 570 F.2d 906 (10th Cir. 1978), *cert. denied*, 439 U.S. 818 (1979); Enfield v. Kleppe, 566 F.2d 1139 (10th Cir. 1977); Atlantic Richfield Co. v. Hickel, 432 F.2d 587 (10th Cir. 1970); Massaglia v. Commissioner, 286 F.2d 258 (10th Cir. 1961); Sanders v. Commissioner, 225 F.2d 629 (1955); United States v. Carter, 197 F.2d 903 (10th Cir. 1952); and United States v. Fitch, 185 F.2d 471 (10th Cir. 1950).

87. 695 F.2d at 1254.

88. *See* Meister Bros. v. Macy, 674 F.2d 1174 (7th Cir. 1982) (estopping administrator of Federal Emergency Management Agency (FEMA) from asserting failure to file a form as a defense to a settlement claim when FEMA had indicated it intended to pay the claim); Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982) (estopping the federal government from disclaiming representations made by a postal worker).

89. *See* Laguna Hermosa Corp. v. Martin, 643 F.2d 1376 (9th Cir. 1981). *Laguna Hermosa* was decided three weeks after *Hansen*. It did not mention *Hansen*, but nonetheless it held that the United States was estopped from denying an extension for a concession contract. *Id.* at 1380.

90. Although the court did not refer to the concession contract in *Laguna Hermosa* as a "commercial transaction," this characterization appears to be accurate in light of the fact that the case involved a contract between a concessionaire and the United States for operating a concession on federal land. *Laguna Hermosa*, 643 F.2d at 1377. In both *Portmann* and *Meister Bros.*, however, the Seventh Circuit expressly relied on the fact the subject matter of the dispute giving rise to the issue of estoppel was a "commercial transaction." *Meister Bros.*, 674 F.2d at 1177; *Portmann*, 674 F.2d at 1169.

was secured by a note and a mortgage, and guaranteed by the Veterans Administration (VA).[91] The lending institution subsequently assigned the note, mortgage, and guaranty to Home Savings & Loan, the plaintiff in *Home Savings*.[92] Some years later, the couple defaulted on their loan, a foreclosure sale was held, and Home Savings & Loan, with VA approval,[93] purchased the house.[94] Home Savings & Loan, exercising an option granted by federal regulation,[95] then conveyed the property to the VA and demanded both reimbursement for the amount paid at foreclosure and payment under the loan guaranty certificate for losses incurred on the loan.[96]

The significant event giving rise to the estoppel controversy occurred when Home Savings transferred the house to the VA. At approximately the same time as the transfer, the original lending institution, by coincidence, informed the VA that the wife's signatures on both the note and the mortgage might be forgeries.[97] Instead of informing Home Savings & Loan of this fact, the VA investigated the possible forgery, in the meantime selling the house and processing and paying Home Savings' loan guaranty claim.[98] Twelve days after paying the loan guaranty claim the VA demanded return of the payment, based upon regulations[99] and a statute[100] which permit the Administrator of the VA to deny liability under a loan guaranty if a signature on the loan is forged. Home Savings returned the money to the VA, but refused to pay an additional sum for expenses demanded by the VA, which amount the VA subsequently offset against other amounts due Home Savings.[101]

Home Savings brought suit to recover amounts claimed under the loan guaranty, and the trial court held that the VA was estopped from asserting the forgery defense because of its acceptance of the deed with knowledge of the potential forgery.[102] The Tenth Circuit ruled that although the failure to disclose the potential forgery to Home Savings & Loan was inaction and therefore not grounds for estoppel,[103] the VA's acceptance of the deed from Home Savings and its subsequent sale of the house constituted "affirmative acts" in a "commercial transaction" which would justify estopping the VA from denying the Home Savings claim.[104]

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91. *Home Sav.*, 695 F.2d at 1252.

92. *Id.*

93. Lenders holding VA guaranteed mortgages can recover (with some exceptions) the amount paid at a foreclosure sale if the VA has previously authorized the bid. 10 C.F.R. § 36.4320 (1983). This recovery does not affect the lender's right to recoup any losses under the VA loan guarantee. *Id.*

94. 695 F.2d at 1252.

95. 38 C.F.R. § 36.4320(a)(1) (1983).

96. 695 F.2d at 1252. The guaranty certificate, which guarantees a lender reimbursement for its loan losses, was authorized by 38 U.S.C. § 1810 (1982). 695 F.2d at 1252.

97. 695 F.2d at 1252.

98. *Id.*

99. 38 C.F.R. § 36.4325(a) (1983).

100. 38 U.S.C. § 1821 (1982).

101. 695 F.2d at 1252.

102. *Id.* at 1253.

103. Inaction, by itself, is generally not sufficient to establish estoppel against the government. *See* Sweeten v. USDA, 684 F.2d 679 (10th Cir. 1982).

104. 695 F.2d at 1254.

C. *Analysis of the Decision*

The majority's analysis was relatively brief. Pointing to language in Supreme Court cases which indicated that estoppel against the government might be proper in some circumstances,[105] the court proceeded to distinguish the Court's decisions rejecting estoppel on the basis that none of those cases had involved a commercial transaction.[106] No reasoning was given to support the commercial transaction distinction. The court merely held the distinction existed, and that Home Savings was entitled to an estoppel based on the VA's acceptance of the deed without giving notice of the potential forgery.[107]

Judge McKay wrote a lengthy and forceful dissent, criticizing the majority's commercial transaction distinction as being "chimerical rather than precedential."[108] Estoppel against the government was not rejected out-of-hand.[109] Instead, the dissent criticized the majority's "commercial transaction" distinction and urged that a different test be used to determine if estoppel should lie against the government. The dissent's test contained two questions: "(1) did misleading conduct induce reasonable detrimental reliance? and (2) are there nevertheless circumstances that caution the court to withhold the exercise of equitable powers?"[110] According to the dissent, the Supreme Court's government estoppel cases could be explained as involving a failure to satisfy these requirements: either the plaintiff had failed to establish the elements of an estoppel,[111] or "circumstances"—particularly separation of powers concerns—made exercise of equitable power inappropriate.[112] Judge McKay disagreed with the majority's conclusion that the VA had engaged in detrimentally misleading conduct, the first part of his test, and therefore found estoppel unavailable without ever reaching the second prong of his test.[113]

105. *Id.* at 1253.

106. *Id.* at 1254.

107. *Id.* at 1254-55. The estoppel arose because once the VA received the deed, Home Savings had no way to collect its deficiency except through the guaranty. In the majority view, the VA caused Home Savings to lock itself into a situation where it was effectively at the mercy of the VA. Hence, the VA should have disclosed the potential fraud, thereby giving Home Savings an opportunity to consider whether to take a chance with the VA (knowing the possibility the guaranty might be avoided) or to dispose of the deed independently. The majority felt that the VA's routine acceptance of the deed in the above circumstances justified estopping a fraud defense to payment of the guaranty. *Id.*

108. *Id.* at 1255 (McKay, J., dissenting). In speaking of the commercial transaction distinction, the dissent noted its concern that the majority's standard would inaugurate "a procession of future cases that will be distinguished on the basis of 'finespun and capricious' characterizations." *Id.* at 1258. *Cf.* Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955) (noting that state court decisions on the governmental/proprietary distinction are confused and irreconcilable).

109. 695 F.2d at 1261 (McKay, J., dissenting).

110. *Id.* at 1259.

111. *Id.* at 1260.

112. *Id.* at 1260-61. Judge McKay's analysis is provocative, as it harmonizes the equitable policy considerations militating towards an estoppel (*e.g.* the inequity of permiting a party to profit through deceptive acts) with the policy considerations militating against holding the government estopped (*e.g.* vast demands on the public fisc). By balancing the two policy factors against each other once the elements of estoppel have been established, the dissent's test protects the government while preventing abuse of citizens.

113. *Id.* at 1261-63. The dissent rejected the majority's treatment of the events leading up

D. *Summation*

Despite what appears to be a blanket refusal by the Supreme Court to recognize estoppel against the government, the Court has not eliminated the possibility of governmental estoppel.[114] The Tenth Circuit, in *Home Savings*, has ventured into the uncertain area of estopping the government. In so doing, it has joined several sister circuits in trying to find a formula that will escape repudiation by the Supreme Court. As long as estopping the government remains a tool of last resort, to be used only when it would be extremely unfair to do otherwise, the Supreme Court will continue to tolerate the infrequent recognition of estoppel exemplified by the Tenth Circuit's decision in *Home Savings*. The potentially broad reach of the Tenth Circuit's "commercial transaction" estoppel doctrine, however, along with the difficulties inherent in distinguishing commercial from proprietary transactions, promise that estoppel issues will continue to be a lively subject within the Tenth Circuit.

## III. JUDICIAL REVIEW OF AGENCY ACTION

A. *Introduction*

Determining the scope of judicial review is crucial for determining the proper role of the courts in reviewing administrative action. If the scope is too limited, the function of judicial review is meaningless.[115] Conversely, the constitutional scheme of separation of powers is violated when courts substitute their judgment for that of the agency.[116] To strike a balance, section 10 of the Administrative Procedure Act (APA)[117] delineates six separate standards for determining the scope of judicial review of agency action, although only two of these standards are frequently used by the courts. Under the first, administrative action is illegal if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[118] In *Citizens to Preserve Overton Park, Inc. v. Volpe*,[119] the Supreme Court held that judicial review under this standard entails determining whether all factors relevant to an administrative decision were considered or whether decision reflects a clear error of judgment.[120] This standard creates a narrow scope of review because

to the litigation, pointing out that Home Savings had made its election prior to the VA's receipt of any information concerning potential fraud. Given Home Savings' independent decision, the dissent found no evidence of the VA induced detrimental reliance. Absent such reliance, all of the elements for estoppel were not present. *Id.* at 1262. Judge McKay's analysis is weakened, however, by his failure to establish that Home Savings' election was binding.

114. Since *Merrill* the Supreme Court has not ruled that the government can never be estopped. In fact, decisions by the Supreme Court suggest that some as yet undefined government actions *may* justify estoppel. For example, the Supreme Court recently stated "[t]his Court has never decided *what type of conduct by a Government employee will estop* the Government . . . ," *Hansen*, 450 U.S. at 788 (emphasis supplied), thereby implying that some foundation for estoppel does exist.

115. *See* Schwartz, *Some Recent Administrative Law Trends: Delegations and Judicial Review*, 1982 WIS. L. REV. 208, 227 (1982).

116. *See generally* United States v. Western Pac. R. Co., 352 U.S. 59, 63-64 (1956).

117. 5 U.S.C. § 706 (1982).

118. 5 U.S.C. § 706(2)(A) (1982).

119. 401 U.S. 402 (1971).

120. *Id.* at 416.

a reviewing court is not permitted to substitute its judgment for that of the agency.[121]

Under the second often applied standard of review, agency action is improper if it is "unsupported by substantial evidence."[122] Unlike the arbitrary or capricious standard, which is applicable to all agency action,[123] the substantial evidence standard is applicable in only two situations: 1) when the administrative action being reviewed is formal rulemaking conducted under the APA;[124] or 2) when the reviewed administrative action is an adjudication.[125] Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[126]

Although these general guidelines are useful, one must look to individual cases to discern which standard will be applied and how rigorous judicial review will be under each. Moreover, the standard of review to be used in each case is not always clear. Often a party challenging agency action asserts that a more demanding standard should apply, such as substantial evidence, but the reviewing court will choose a more lenient standard, such as the arbitrary or capricious test. It is therefore important to review case law to determine which sets of facts give rise to which standards. The following paragraphs will review several of the decisions handed down by the Tenth Circuit this term and will analyze the scope of judicial review applied in each.

### B. *Review Utilizing the Arbitrary, Capricious, or Abuse of Discretion Standard*

In order to understand how the Tenth Circuit applies the arbitrary or capricious standard, four cases will be discussed briefly. The first is *Anderson v. Department of Housing*.[127] In *Anderson*, the Tenth Circuit considered which standard to apply in reviewing a Department of Housing and Urban Development (HUD) mortgage assignment decision. By statute,[128] the Secretary was authorized to prescribe regulations to implement a mortgage insurance program designed to assist low-income families in purchasing a home. One provision of the implementing regulations permitted HUD to accept mortgage assignments for the purpose of preventing foreclosures.[129] The statute

121. *Id.* In the recent decision of Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, 103 S. Ct. 2246 (1983), the Supreme Court noted that the arbitrary and capricious standard articulated in *Overton Park* is still the correct formulation. 103 S. Ct. at 2257. The Court also noted: "It is not our task to determine what decision we, as Commissioners [of the Nuclear Regulatory Commission], would have reached. Our only task is to determine whether the commission has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Id.*

122. 5 U.S.C. § 706(2)(E) (1982).

123. *See Overton Park*, 401 U.S. at 413-14.

124. 5 U.S.C. § 706(2)(E) (1982).

125. *Id.*

126. Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

127. 701 F.2d 112 (10th Cir. 1983).

128. 12 U.S.C. § 1709(a) (1982).

129. 24 C.F.R. § 203.640(a) (1983).

did not mention such a provision.[130]

HUD denied Anderson's request that HUD accept an assignment after her default and she brought suit challenging the denial.[131] The Tenth Circuit characterized HUD's refusal as "informal agency action" and therefore held that the arbitrary or capricious standard should apply.[132] The court affirmed the agency action, holding that because the record showed that the agency followed its own internal guidelines and had not acted irrationally, the refusal was not arbitrary, capricious, or an abuse of discretion.[133]

A second case providing insight into application of the abuse of discretion standard involved an Occupational Safety and Health Review Commission (OSHRC) violation of its own procedural guidelines. The court in *Dye Construction Co. v. OSHRC*[134] held that the violation did not constitute an abuse of discretion, and affirmed OSHRC's decision.

The violation arose when the administrative complaint against Dye was amended to extend the period of Dye's alleged improper behavior.[135] OSHRC was required by its regulations to set forth its reasons for amending a complaint.[136] Although OSHRC failed to do so in this case, the court noted that the regulation provides no sanctions for such a failure, and that dismissal of the complaint was therefore not automatically required.[137] The court then found that the petitioning construction company was not surprised or prejudiced by the amendment; hence, the failure to comply with the regulations was not an abuse of discretion.[138]

A third case reviewed under the arbitrary or capricious standard was *American Trucking Association v. ICC*,[139] examining an ICC decision granting a railroad company's subsidiary unrestricted authority to operate as a motor carrier. The Tenth Circuit held that this grant of authority did not constitute an abuse of discretion.[140]

By statute, the ICC is permitted to grant motor carrier authority to a railroad subsidiary only upon a showing that the transaction is consistent with the public interest, will enable the railroad to use its rail service to public advantage, and will not restrain competition.[141] The Supreme Court has held that to meet the statutory standard "special circumstances" must be shown.[142]

The plaintiffs had two separate arguments. First, they argued that one permit lacked the required finding of special circumstances.[143] Second, they

130. 701 F.2d at 114.
131. *Id.* at 113.
132. *Id.*
133. *Id.* at 114-15.
134. 698 F.2d 423 (10th Cir. 1983).
135. *Id.* at 425.
136. 29 C.F.R. § 2200.33(a)(3) (1983).
137. 698 F.2d at 425.
138. *Id.*
139. 703 F.2d 459 (10th Cir. 1983).
140. *Id.* at 462.
141. 49 U.S.C. § 11344(c) (1976).
142. American Trucking Ass'ns v. United States, 355 U.S. 141, 151-52 (1957).
143. 703 F.2d at 462.

argued that the Commission's reversal of a lower administrative tribunal's finding of no special circumstances on a second permit was not supported by the record.[144]

The Tenth Circuit's decision to uphold the ICC[145] is not as significant as its delineation of the appropriate standard of review. The court relied upon a formulation announced in an earlier Tenth Circuit case, *Midwestern Transportation, Inc. v. ICC*.[146] In both *Midwestern* and *American Trucking* the Tenth Circuit combined the arbitrary or capricious standard and the substantial evidence standard for purposes of reviewing ICC decisions.[147] Such a combining of standards, however, seems inconsistent with the leading case of *Citizens to Preserve Overton Park, Inc. v. Volpe*[148] which noted that the substantial evidence standard was only applicable in statutorily defined circumstances.[149] Until the Tenth Circuit establishes that those circumstances are present in this class of cases, its hybrid standard is improper.

Finally, in another ICC case, *Turner Brothers Trucking Co. v. ICC*,[150] the administrative action at issue was a denial of a request for a waiver from an ICC rule.[151] The court, relying upon *Citizens to Preserve Overton Park, Inc. v. Volpe*,[152] noted that it could not substitute its judgment for that of the agency[153] and upheld denial of the waiver.[154] Although the court did not characterize the waiver denial, the holding implies that the denial was "informal" agency action and therefore subject to the arbitrary or capricious standard of review.[155] *Turner Brothers* also rejected a due process challenge, holding that the Constitution did not require a hearing on a decision denying a request for a specific waiver from a rule of general application.[156]

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144. *Id.* at 463.

145. *Id.* The Tenth Circuit equated a finding of special circumstances with a finding of action in the public interest. The administrative records supported this finding, justifying grant of the permits. *Id.* at 462-63.

146. 635 F.2d 771 (10th Cir. 1980).

147. In *Midwestern Transp.*, the court defined the standard of review as follows:

> The Administrative Procedure Act, 5 U.S.C. § 706(2) provides . . . that a reviewing court shall set aside agency action if determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law *or unsupported by substantial evidence on the record as a whole*.
>
> The ICC interpretations of its regulations and the facts supporting a grant or denial of a certificate require recognition of its expertise and our deference thereto.

*Id.* at 774 (emphasis supplied, citation omitted).

In *American Trucking Ass'ns,* the court defined the standard of review as follows:

> It is axiomatic that the scope of review by an appellate court of a Commission decision is a narrow one. We may not set aside Commission action unless it be arbitrary, capricious, and an abuse of discretion, or unless it be otherwise not in accord with law *or unsupported by substantial evidence on the record as a whole*.

703 F.2d at 462 (emphasis supplied).

148. 401 U.S. 402 (1971).

149. *Id.* at 414. Those circumstances exist when an agency engages in rulemaking required to be on the record, or an adjudication. 11 U.S.C. § 702(2)(E) (1982); *see also id.* at §§ 553(c), 554(c)(2).

150. 684 F.2d 701 (10th Cir. 1982).

151. 49 C.F.R. § 1057.12(g), (h) (1982). This regulation details billing requirements imposed on carriers leasing their equipment.

152. 401 U.S. 402 (1971).

153. 684 F.2d at 703.

154. *Id.* at 704.

155. *Id.* at 703.

156. *Id.* at 703-04.

In summary, plaintiffs were not successful in challenging informal agency action during the survey period. In each of the cases reviewed which applied the "arbitrary, capricious, or abuse of discretion" standard, agency action was sustained.

C. *Substantial Evidence Review*

The substantial evidence standard is less deferential to an agency than the arbitrary or capricious standard. It is therefore not surprising that of the thirty administrative law cases reviewed during the survey period, two of the three cases where a federal agency was reversed were a result of the agency failing to satisfy the substantial evidence test.[157] Both cases involved a denial of Social Security benefits.

In the first case, *Broadbent v. Harris*,[158] the plaintiff sought Social Security disability benefits. *Broadbent* reviewed a decision by an administrative law judge (ALJ) who had recommended that plaintiff's application for benefits be denied because the plaintiff was not "disabled" as defined by the relevant statute.[159] The ALJ relied heavily on the finding of no disability by the single physician who examined the plaintiff on behalf of the Social Security Administration,[160] rejecting the opinions of six independent physicians who found the plaintiff to be disabled.[161] The Tenth Circuit noted that although ALJ determinations are generally binding on a reviewing court,[162] in this case the ALJ had not given sufficient weight to the testimony of the six independent doctors, who had had much more experience examining the plaintiff.[163] Considering the record as a whole, the plaintiff's prima facie case of disability was not rebutted and the administrative decision did not meet the substantial evidence test.[164] Although the court did not expressly articulate the basis for its ruling, the court in effect ruled that the medical report by the one government-hired doctor did not constitute the "more than a mere scintilla"[165] of evidence necessary to sustain the administrative decision.[166]

The second case overturning an administrative decision under the substantial evidence test is *Cavitt v. Schweiker*.[167] The issue in *Cavitt*, as in *Broadbent*, was whether an applicant was eligible for Social Security disabil-

157. These two cases Broadbent v. Harris, 698 F.2d 407 (10th Cir. 1983) and Cavitt v. Schweiker, 704 F.2d 1193 (10th Cir. 1983), will be discussed immediately below. The third case referred to is Home Savings & Loan Ass'n v. Nimmo, 695 F.2d 1251 (10th Cir. 1982). For a discussion of *Home Savings, see supra* notes 74-114 and accompanying text.

158. 698 F.2d 407 (10th Cir. 1983).

159. *Id.* at 411. 42 U.S.C. § 423(d) (1976 & Supp. V 1981) defines "disability" for purposes of the Social Security laws.

160. 698 F.2d at 409.

161. *Id.*

162. *Id.* at 413 (citing Richardson v. Perales, 402 U.S. 389 (1971)).

163. 698 F.2d at 414.

164. *Id.*

165. *Id. See also* Richardson v. Perales, 402 U.S. 389, 401 (1971) (defining substantial evidence to mean relevant evidence a reasonable mind would accept as supporting an administrative conclusion).

166. *See* 698 F.2d at 414.

167. 704 F.2d 1193 (10th Cir. 1983).

ity benefits.[168] Here, as in *Broadbent*, the court cited *Richardson v. Perales*,[169] and held that a "reasonable mind" would not conclude that the plaintiff was not disabled within the meaning of the social security laws.[170] Again, as in *Broadbent*, the available medical evidence weighed strongly in favor of the applicant.[171]

In *Meredith Corp. v. NLRB*,[172] the court reviewed a NLRB decision that directors and production managers were not "supervisors" within the meaning of the National Labor Relations Act (NLRA).[173] The NLRB held that the employees were not supervisors, and that the employer violated the NLRA by failing to negotiate collectively with these employees.[174] The basis of the NLRB's decision was that any control the directors or production managers exercised over other employees was either routine or motivated by artistic reasons, and that this control was not supervisory.[175] The court, after making a detailed review, sustained the NLRB's decision because it was supported by substantial evidence.[176] Doubt was expressed, however, concerning the relevance of "artistic motivation" in determining the supervisory status of a particular position.[177]

The substantial evidence test was also used in *CCI, Inc. v. OSHRC*[178] to determine whether a citation issued pursuant to the Occupational Safety and Health Act (OSHA)[179] was sustainable. OSHA regulations require shaping and shoring of excavation trenches when certain soil conditions are present.[180] OSHRC held CCI in violation of these regulations.[181] On review, the court focused on evidence pertaining to soil conditions.[182] Because of strong evidence that the kinds of soil conditions requiring shoring or trenching were present,[183] the agency's burden under the substantial evidence test was met.[184]

## IV. Exclusive Jurisdiction: Contracts for Interstate Sales of Power

In *Utah v. Federal Energy Regulatory Commission*,[185] the Tenth Circuit re-

168. *Id.* at 1194.
169. 402 U.S. 389 (1971).
170. 704 F.2d at 1195.
171. *Id.* at 1194-95.
172. 679 F.2d 1332 (10th Cir. 1982).
173. 29 U.S.C. §§ 151-169 (1982).
174. 679 F.2d at 1335.
175. *Id.* at 1341.
176. *Id.* at 1345.
177. *Id.* at 1344.
178. 688 F.2d 88 (10th Cir. 1982).
179. 29 U.S.C. §§ 651-678 (1982).
180. 29 C.F.R. § 1926.652(c) (1983).
181. 688 F.2d at 89.
182. *Id.* at 89-90.
183. The court held that in a multi-material excavation the applicability of the trenching regulations turned on the weakest significant component of the soil. *Id.* at 90. The substantial evidence inquiry could therefore be satisfied without showing the soil was exclusively of the type covered by 29 C.F.R. § 1926.652(c). 688 F.2d at 90.
184. 688 F.2d at 90.
185. 691 F.2d 444 (10th Cir. 1982).

jected an attempt by the Utah Public Service Commission (PSC) to circumvent the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC).[186] The specific issue in *Utah v. FERC* concerned a wholesale contract between Utah Power, a utility under the jurisdiction of the Utah PSC, and Sierra Pacific Power Company, a utility operating in Nevada and California.[187] The Utah PSC asserted jurisdiction over this contract based on its jurisdiction over Utah Power's generating facilities.[188] Finding the FERC approved contract not in the best interest of Utah's utility customers, PSC ordered Utah Power not to comply with the terms of the contract.[189] FERC, upon Sierra Pacific's motion for declaratory relief, held that its jurisdiction over the contract was exclusive, and directed Utah Power to comply with the contract.[190] The Tenth Circuit then addressed the conflict on a petition for review of the FERC order.[191]

The Tenth Circuit rejected PSC's assertion of jurisdiction. Congress, the circuit held, had given FERC exclusive jurisdiction over contracts for wholesale interstate power sales.[192] The PSC's argument that the FERC approval was in effect an order to construct additional generating facilities, and therefore not within FERC's exclusive jurisdiction, was rejected.[193] FERC's order merely approved the contract for sale of power; because it did not mandate the manner in which the contract was to be performed, the order remained within FERC's exclusive jurisdiction.[194] As an alternate basis for upholding FERC, the Tenth Circuit characterized the PSC order as an attempt to benefit Utah utility customers at the expense of out-of-state utility customers, which was invalid as an attempted protectionist measure.[195] Finally, given the parties' knowledge that FERC had exclusive jurisdiction over the contract, a contractual clause requiring approval by "regulatory authorities having jurisdiction" was held to contemplate only FERC's approval.[196]

Summing up its decision, the court noted that Congress had placed such contracts under the exclusive review of FERC, and had placed FERC's decisions under review by the courts. If in fact the contract became unduly burdensome, "surely relief would be available."[197] Absent such a showing (which was not urged upon the court), the only proper course of action was to affirm FERC's exclusive jurisdiction.

186. It has long been recognized that FERC has exclusive jurisdiction over wholesale interstate sales of electric power under the Federal Power Act, 16 U.S.C. §§ 794a-828c (1982). *See, e.g.*, Federal Power Comm'n v. Southern Cal. Edison Co., 376 U.S. 205 (1964).

187. 691 F.2d at 445.

188. *Id.* at 446.

189. *Id.*

190. *Id.*

191. *Id.* at 445.

192. *Id.* at 447-48. The court noted that FERC did not have exclusive jurisdiction over *intrastate* power sales, nor over interstate *retail* power sales. *Id.* at 447.

193. *Id.* at 448.

194. *Id.*

195. *Id.* (citing New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)).

196. 691 F.2d at 448.

197. *Id.* at 448-49.

## V. SUBSTANTIAL FEDERAL QUESTION EXCEPTION TO PRIMARY JURISDICTION

In *Mountain States Natural Gas Corp. v. Petroleum Corp. of Texas*,[198] the Tenth Circuit held that the presence of a "substantial federal question" could circumvent the bar to original judicial review created by the primary jurisdiction doctrine.[199] In arriving at this conclusion the Tenth Circuit extended precedent previously recognizing that plaintiffs presenting substantial federal questions were not required to exhaust their administrative remedies.[200] The analysis below questions the propriety of that extension.

*Mountain States* began when the defendant Petroleum Corp. of Texas (Petco) obtained a state agency[201] order permitting Petco to pool its leased acreage with the acreage of Mountain States, another oil company, for the purpose of producing an oil well.[202] The pooling order required Petco to give all persons with interests in the common field, including Mountain States, notice of drilling at least thirty days before drilling commenced.[203] Upon receipt of the notice an interested party had the option of paying estimated well costs (provided by Petco), or of paying its share of production costs from revenues.[204] Failure to pay the estimated costs resulted in a risk penalty of 200% of the required payment.[205]

Petco sent the required notice to Mountain States, although not within time periods stipulated by the order.[206] Mountain States never retrieved the notice from its post office box.[207] Petco was aware of this, but it took no further action to notify Mountain States that drilling was commencing, instead assessing the 200% penalty against Mountain States' share of the proceeds from the well.[208] Litigation ensued when Petco refused to permit Mountain States, independently apprised of the drilling, to pay its share of

198. 693 F.2d 1015 (10th Cir. 1983).

199. Primary jurisdiction is a court-made doctrine, grounded in separation of powers concerns. It allocates decisionmaking power between a court and an administrative agency having concurrent jurisdiction over a dispute. When applicable, the doctrine mandates deferring judicial consideration of an issue until the agency has given its decision. Following agency action the court exercises a review power of varying scope. For example, administrative interpretations of law may be subjected to de novo review, while administrative factfinding may be given great deference. One essential feature of the doctrine is that the court upon review may not usurp the decisionmaking power allocated to the agency. *See generally* 4 K. DAVIS, *supra* note 18, at § 22:1 (2d ed. 1983); B. SCHWARTZ, ADMINISTRATIVE LAW §§ 166-168 (1976).

200. *See* 693 F.2d at 1019.

201. *Mountain States* involved the interaction between a federal court and a state agency's primary jurisdiction. The policies which underly the primary jurisdiction doctrine should apply with equal force to both federal and state agencies. *See supra* note 199. Nonetheless, because application of the primary jurisdiction doctrine in the federal court [state agency context may raise different considerations than those present in the federal court] federal agency context, *see* 4 K. DAVIS, *supra* note 18, at § 26:14 (2d ed. 1983), the Tenth Circuit should have examined the intrinsic propriety of using the primary jurisdiction doctrine in *Mountain States*.

202. 693 F.2d at 1017. The order permitted Petco to capture the oil from a common field over Mountain States' objection. *Id.*

203. *Id.* at 1017.

204. *Id.*

205. *Id.*

206. *Id.* at 1017-18.

207. *Id.* at 1017.

208. *Id.*

estimated costs and recover the 200% penalty.[209]

Mountain States claimed Petco's failure to provide the required notice constituted a denial of due process.[210] Petco responded by claiming that the New Mexico Oil Conservation Division (Division) had primary jurisdiction over the question of compliance with its orders.[211] The federal district court first ruled in Petco's favor, dismissing the complaint until the Division had considered the issues; upon motion for reconsideration, however, the district court set aside its dismissal and heard the case.[212] The district court, holding in favor of Mountain States, did not rest its decision on due process grounds, instead holding that the Division's order required actual notice at least thirty days prior to drilling, and that Petco had failed to meet that requirement.[213]

Petco appealed on the grounds that the district court erred by failing to recognize the Division's primary jurisdiction, that Mountain States' due process claim was insufficient as a matter of law, and that the construction of the notice was not raised by the pleadings.[214] The Tenth Circuit did not reach the merits of the due process claim, resting its decision on the district court's construction of the notice.[215] In arriving at the decision on the merits, however, the Tenth Circuit created an exception to the primary jurisdiction doctrine, allowing courts to bypass agencies when a plaintiff merely presents a substantial federal question.[216] This exception, however, is so broad that it undermines the primary jurisdiction doctrine.

The Tenth Circuit's exception was premised on the close relationship between the doctrines of primary jurisdiction and exhaustion of administrative remedies.[217] Given that close relationship, conditions justifying exceptions to the exhaustion requirement were perceived to justify exceptions to an agency's primary jurisdiction.[218] Its reading of cases dealing with exceptions to the exhaustion doctrine led the court to conclude that when a substantial federal question was present, exhaustion, and therefore resort to primary jurisdiction, was not required.[219] The result is the creation of an exception to primary jurisdiction which is sui generis.

*Martinez v. Richardson*,[220] an earlier Tenth Circuit decision, was the primary authority relied on in creating the substantial federal question exception. *Martinez* held that exhaustion was not required if existing administrative remedies were inadequate and a "federal question is so plain that exhaustion is excused."[221] This proposition was articulated by relying upon the Supreme Court's decision in *Greene v. United States*.[222] *Greene*, how-

209. *Id.* at 1018.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 1020.
216. *Id.* at 1018-19.
217. *See id.* at 1018.
218. *See id.* at 1018-19.
219. *Id.* at 1019.
220. 472 F.2d 1121 (10th Cir. 1972).
221. *Id.* at 1125.
222. 376 U.S. 149 (1964). *See* 472 F2d at 1125 n.10.

ever, said nothing about excusing the exhaustion requirement when a federal question was plain. Quite to the contrary, the Court's holding in *Greene* was limited to concluding that existing administrative remedies were inadequate with respect to Greene's claim.[223] Thus, *Martinez'* language concerning a federal question exception to exhaustion is not supported by Supreme Court precedent.

Further, although *Martinez* referred to a federal question exception to the exhaustion doctrine, *Martinez* was in fact decided upon traditional grounds for bypassing the exhaustion requirement. Inadequacy of existing administrative remedies is a well recognized exception to the exhaustion requirement.[224] Administrative remedies were inadequate in *Martinez* because the plaintiffs were elderly and infirm and because there was an extreme unlikelihood of meaningful administrative relief.[225] Accordingly, the actual ground of decision in *Martinez* is consistent with *Greene*, and does not support recognition of a general federal question exception to administrative review.

The Tenth Circuit in *Mountain States* also sought to justify its refusal to defer to the Division's primary jurisdiction by relying upon *McKart v. United States*[226] and *Mathews v. Eldridge*.[227] *McKart*, while in fact holding that exhaustion was not an invariable requirement, was also a very narrow holding. The Court noted that *McKart* did not involve mere premature resort to judicial process, but involved a situation in which the plaintiff's failure to take an administrative appeal prevented him from raising certain defenses to criminal prosecution.[228] Plaintiff's interest therefore outweighed the considerations of deference to agency jurisdiction underlying the exhaustion requirement.[229] *McKart* therefore establishes only that when a substantial liberty interest will be unfairly denied, exhaustion will not be required.[230] Similarly, *Mathews* recognized only that a procedural due process challenge could be raised without exhaustion when hardship to the claimant outweighs the benefits flowing from the exhaustion doctrine.[231] *McKart* and *Mathews* clearly do not support the Tenth Circuit's conclusion that merely asserting a substantial federal question justifies circumventing the exhaustion requirement and, by analogy, the primary jurisdiction doctrine.

There are a number of other considerations which demonstrate the inappropriateness of the court's assumption of jurisdiction. For example, there was no evidence in the opinion that the Division was without competence to decide constitutional questions concerning its alleged actions; in all likelihood, the Division had such power.[232] Thus, traditional grounds for

223. *See* 376 U.S. at 163.
224. *See* 472 F.2d at 1125.
225. *Id.*
226. 395 U.S. 185 (1969).
227. 424 U.S. 319 (1976).
228. 395 U.S. at 197.
229. *Id.*
230. *Cf.* Moore v. City of East Cleveland, 431 U.S. 491, 494 n.5 (1977) (exhaustion not necessarily appropriate when facing criminal penalty).
231. *See* 424 U.S. at 330-31. *See also* 4 K. DAVIS, *supra* note 18, at § 22:1 (2d ed. 1983).
232. *Cf.* 4 K. DAVIS, *supra* note 18, at § 26:6, at 435 (2d ed. 1983) (agencies typically have authority to decide constitutionality of their actions).

refusing to defer to administrative remedies were not present.[233] In addition, under well-established principles the presence of a nonconstitutional ground for granting plaintiff's requested relief mandated deference to the agency.[234] Further, deferring receipt of money, in the absence of a showing of undue hardship, does not justify bypassing an agency.[235] Given the allocation of decisionmaking power reflected in the doctrine of primary jurisdiction, with its separation of powers implications, even if exceptions to primary jurisdiction exist arguendo, *Mountain States* was clearly not a case to apply those exceptions.

The actual relief granted by the Tenth Circuit in *Mountain States* also underscores the inappropriateness of not dismissing the complaint until the state agency had considered the issues. The Tenth Circuit's decision relied upon the Division's own order, requiring that thirty-days notice be given prior to drilling, to decide the case.[236] By so doing, the court prevented the agency from enforcing its own order and ignored an important reason for the primary jurisdiction doctrine's existence—allowing an agency to carry out its statutory mandate.

*Mountain States* creates a rule of administrative law which deviates from established principles. The "federal question" exception creates a large potential for disturbing the proper allocation of function between court and agency, especially because the facts of *Mountain States* reflect an absence of the traditional, equitably-oriented grounds for bypassing administrative review. It is submitted here that the Tenth Circuit should either repudiate the direct holding in *Mountain States*, or limit it to situations akin to *Martinez* and *Mathews*. Failure to do so may cause unforeseen increases in the federal docket and may disrupt the legislative allocation of power between court and agency.

## VI. REJECTION OF ADMINISTRATIVE *MIRANDA* RIGHTS

In *Sorensen v. National Transportation Safety Board*,[237] a commercial pilot's certificate was suspended for violation of regulations prohibiting both the operation of an aircraft within eight hours of drinking an alcoholic beverage or while under the influence of alcohol,[238] and the operation of an aircraft recklessly or carelessly.[239] The pilot challenged the certificate suspension and novelly claimed that evidence, obtained during a brief detention by airport security, should have been excluded from the administrative hearing

233. *Cf. id.* § 26:1, at 414-15 (exhaustion not required where agency has no jurisdiction over a relevant question of law, or where resort to agency would be futile).

234. *Id.* § 26:8, at 450. *See also* Pub. Util. Comm'n v. United States, 355 U.S. 534, 539-40 (1958). The agency could have resolved the dispute by construing its order to require actual rather than constructive notice, thereby precluding assessment of a risk penalty against Mountain States.

235. *Cf.* Mathews v. Eldridge, 424 U.S. 319, 331 (1976) (undue hardship from deferral of monetary payment justified bypassing administrative proceeding).

236. 693 F.2d at 1020.

237. 684 F.2d 683 (10th Cir. 1982).

238. 14 C.F.R. §§ 91.11(a)(1)-(2) (1983).

239. 14 C.F.R. § 91.9 (1983).

pursuant to *Miranda v. Arizona*.[240] The Tenth Circuit rejected this assertion on the basis that no criminal charges were contemplated at the time of the detention, that there had been no coercive atmosphere surrounding the detention, and that there had been no significant deprivation of freedom.[241] Given these factors, the constitutional protections of *Miranda* were irrelevant, and there was no mistake in admitting evidence obtained at the detention.[242]

A second interesting point raised by *Sorenson* related to the use of hearsay in administrative proceedings. Sorenson claimed that the agency had relied exclusively on uncorroborated hearsay in suspending his license.[243] The Tenth Circuit rejected this contention, but noted that whether uncorroborated hearsay can constitute substantial evidence remained an open question.[244]

## VII. FREEDOM OF INFORMATION ACT

Only one case decided during the survey period involved the Freedom of Information Act (FOIA).[245] In *Aviation Data Service v. FAA*,[246] the issue considered was whether attorney fees should be awarded to a prevailing party if the FOIA request was for commercial purposes. Here, the complainant was in the business of seeking information from the government.[247] Litigation ensued when the FAA refused to provide plaintiff with names and addresses of airmen and aircraft registrants.[248]

The FOIA allows attorney fees to be awarded to a complainant who is forced to take the government to court to obtain information under the FOIA if the complainant "substantially prevails."[249] This provision does not, however, create an absolute right to attorney fees.[250] The Tenth Circuit, relying primarily upon several cases extensively reviewing the legislative history of the FOIA,[251] held that in an FOIA case seeking information for commercial gain, some "public benefit" or willful agency misconduct must be shown before attorney fees will be awarded.[252] "Public benefit" was defined in terms of information which would assist citizens in making informed political decisions.[253] Finding no such benefit to the public in this

240. 384 U.S. 436 (1966). *See* 684 F.2d at 685.
241. 684 F.2d at 685-86.
242. *Id.*
243. *Id.* at 686.
244. *Id.*
245. 5 U.S.C. § 552 (1982).
246. 687 F.2d 1319 (10th Cir. 1982).
247. *Id.* at 1320.
248. *Id.* at 1321.
249. 5 U.S.C. § 552(a)(4)(E) (1982) provides: "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."
250. 687 F.2d at 1321.
251. The court relied on La Salle Extension University v. FTC, 627 F.2d 481 (D.C. Cir. 1980); Fenster v. Brown, 617 F.2d 740 (D.C. Cir. 1979), and Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C. Cir. 1977). *See* 687 F.2d at 1321-22.
252. 687 F.2d at 1322.
253. *Id.* at 1323.

case and no agency misconduct, the Tenth Circuit denied an award of attorney fees.[254]

## VIII. LIMITING AGENCY RIGHT TO INSPECT REQUIRED RECORDS

In *CAB v. Frontier Airlines, Inc.*[255] the Tenth Circuit, on rehearing en banc, considered whether the Civil Aeronautics Board (CAB) had authority to inspect all the minutes of Frontier's directors meetings without stating a proper investigative purpose. Frontier was required to keep those records as a condition of its operation.[256] CAB asserted that the Federal Aviation Act of 1958[257] authorized complete access to airline company records required by statute, regardless of investigatory purpose.[258] In the original panel decision, the Tenth Circuit held that the CAB was not required to show a relevant purpose in order to obtain access to the minutes.[259]

Upon rehearing en banc the Tenth Circuit reversed the panel and, in a five to three decision, held that a "rule of reason" must be applied to CAB investigations.[260] The basis of the decision was an interpretation of the statute granting the CAB the power to examine the records regulated airlines are required to keep.[261] The court held that the statute embodied a congressional intent to limit CAB access to those records reasonably necessary to the purpose of a particular investigation.[262] But the court's solution of ordering an in camera inspection to determine what documents were necessary to CAB's investigation is questionable. The majority went to considerable lengths to argue that resorting to this technique should not be done on a regular basis.[263] Relying on such ad hoc solutions, however, does little to help either an agency or a regulatee understand the limits of agency investigative powers.

The dissenting judges rejected the majority's balancing concerns. Judge McKay, dissenting alone and also joining Judge McWilliams in Judge Logan's dissent, reasoned that if welfare recipients could be required to submit to inspection as a condition of continued benefits,[264] it was not necessary to show any greater consideration to an airline enjoying the benefits of agency regulation.[265] All three dissenters also rejected the majority's statutory analysis, finding no congressional intent to limit CAB's right to inspect required records.[266] The dissenters viewed the majority's decision as unwarranted (based on precedent and congressional intent) and unsound (based on the

254. *Id.* at 1324.
255. 686 F.2d 854 (10th Cir. 1982) (en banc).
256. *Id.* at 857.
257. 49 U.S.C. §§ 1301-1552 (1976 & Supp. V 1981).
258. 686 F.2d at 856.
259. CAB v. Frontier Airlines, Inc., No. 79-1584 (10th Cir. April 17, 1981), *rev'd*, 686 F.2d 854 (10th Cir. 1982) (en banc). *See also Administrative Law, Eighth Annual Tenth Circuit Survey*, 59 DEN. L.J. 173, 212-15 (1982).
260. 686 F.2d at 858.
261. 49 U.S.C. § 1377(e) (Supp. V 1981).
262. 686 F.2d at 860.
263. *Id.*
264. *Id.* at 861 (McKay, J., dissenting) (citing Wyman v. James, 400 U.S. 309 (1971)).
265. 686 F.2d at 861 (McKay, J., dissenting).
266. *Id.* at 862 (Logan, J., dissenting).

foreseeable injection of the judiciary into agency/airline disputes).[267]

## IX. CONCLUSION

The commentator in last year's administrative law comment appearing in the Denver Law Journal's Ninth Annual Tenth Circuit Survey concluded by stating that in the area of administrative law the Tenth Circuit's decisions were "more notable for their evenhanded application of the law than for equitable considerations."[268]

This survey period, however, equitable considerations were apparent in a number of decisions as the court addressed several controversial administrative law questions. *Thompson* provided an opportunity for examination of the ongoing debate over the propriety of generic rulemaking;[269] *Home Savings* found the Tenth Circuit recognizing estoppel against the government;[270] *Mountain States* created a new (and questionable) exception to the doctrine of primary jurisdiction;[271] and other decisions sparked controversy and dissent among the judges. The opinions reviewed for this survey demonstrate the volatility of administrative law and therefore the need for further evaluation of existing administrative theory and precedent.

*Richard A. Westfall*

267. *Id.*
268. *Administrative Law, Ninth Annual Tenth Circuit Survey*, 60 DEN. L.J. 149, 176 (1983).
269. *See supra* notes 8-73 and accompanying text.
270. *See supra* notes 74-114 and accompanying text.
271. *See supra* notes 198-236 and accompanying text.

# ANTITRUST LAW

## OVERVIEW

During the period of this survey the Tenth Circuit Court of Appeals' antitrust decisions all involved private actions brought pursuant to the Sherman Act.[1] The court was given the opportunity to address the issue of per se versus rule of reason analysis under section 1 of the Sherman Act[2] in *Board of Regents v. National Collegiate Athletic Association.*[3] In other cases surveyed herein the court considered issues involving jurisdiction under the Sherman Act,[4] vertical price restraints,[5] attempted monopolization,[6] and the corporate conspiracy doctrine.[7] Additionally, the court construed the scope of the National Football League's limited antitrust exemption,[8] ruled on the appropriate statute of limitations analysis for claims involving business failures,[9] and articulated the conditions necessary to state an antitrust claim relating to a competitor's purchase of idle production facilities.[10]

## I. PER SE ANALYSIS AND INTEGRATED MARKETING ARRANGEMENTS: FOOTBALL POWERS 2, NCAA 0

In *Board of Regents v. National Collegiate Athletic Association*,[11] the Tenth Circuit, over Judge Barrett's dissent, held that exclusive broadcasting contracts between the National Collegiate Athletic Association (NCAA) and three television networks were both per se and rule of reason violations[12] of the Sherman Act.[13] This comment will articulate the reasoning of the Tenth Circuit and the district court, and will briefly consider the Tenth Circuit's per se methodology in light of recent Burger Court decisions.

### A. *Facts*

The NCAA, founded in 1905, consists of approximately 800 member

1. 15 U.S.C. §§ 1-7 (1982).
2. 15 U.S.C. § 1 (1982).
3. 707 F.2d 1147 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983).
4. *See* Lease Lights, Inc. v. Public Serv. Co., 701 F.2d 794 (10th Cir. 1983).
5. *See* A.A.A. Liquors, Inc. v. Joseph E. Seagram & Sons, Inc., 705 F.2d 1203 (10th Cir.), *cert. denied*, 103 S. Ct. 1903 (1983).
6. *See* Olsen v. Progressive Music Supply, Inc., 703 F.2d 432 (10th Cir.), *cert. denied*, 104 S. Ct. 197 (1983).
7. *See* Holter v. Moore & Co., 702 F.2d 854 (10th Cir. 1983), *cert. denied*, 104 S. Ct. 347 (1983).
8. *See* Colorado High School Activities Ass'n v. National Football League, 711 F.2d 943 (10th Cir. 1983).
9. *See* Curtis v. Campbell-Taggart, Inc., 687 F.2d 336 (10th Cir.), *cert. denied*, 103 S. Ct. 576 (1982).
10. *See id.*
11. 707 F.2d 1147 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983).
12. For a discussion of the distinction between per se and rule of reason violations of section 1 of the Sherman Act, *see infra* notes 36-39 and accompanying text.
13. 707 F.2d at 1156, 1160.

colleges and universities.[14] The NCAA exercises control over diverse aspects of intercollegiate athletic competition including playing rules, recruiting regulations, standards of academic eligibility, and amateurism.[15] These functions are consistent with the NCAA's original purposes of preserving college sports on an amateur level and ensuring that student athletics are integrated with a university's educational mission.[16]

The NCAA has regulated football telecasts of member schools since 1953.[17] Regulation was initiated in response to the concern of some NCAA members that live attendance at their games would suffer as a result of competition from televised games.[18] Early regulations included allocation of television revenue, limitation of the number of weekly football telecasts, and limitation of the number of appearances permitted a team during the season.[19]

From 1953 through 1976 the specific television controls imposed upon member schools were subject to approval by direct vote of the entire NCAA membership, only a minority of which were schools having "major" football programs.[20] Since 1976, the specific details of the controls have not been subject to direct vote.[21] Member schools now vote only upon general guidelines, while the controls themselves are formulated through negotiation between the NCAA and the television networks.[22]

By the mid-1970's a majority of the large schools operating successful

14. Board of Regents v. National Collegiate Athletic Association, 546 F. Supp. 1276, 1282 (W.D. Okla. 1982), *aff'd in part and rev'd in part*, 707 F.2d 1147 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983).

15. 546 F. Supp. at 1284.

16. *See* 707 F.2d at 1163-64 (Barrett, J., dissenting).

17. 546 F. Supp. at 1283. Until 1971 authority for the control of football telecasts was derived from the general powers granted to the NCAA in its constitution and bylaws. In 1971 the bylaws were amended to add language specifically granting authority to regulate members' football telecasts. Bylaw 11-1-(aa) provided in pertinent part: "The [Football Television] Committee shall be responsible for the formulation and administration of the Association's football television policy and program, subject to the approval of the membership." 546 F. Supp. at 1284. In 1981 the NCAA issued an "Official Interpretation" of Bylaw 11-1-(aa) reaffirming its exclusive power to control football telecasts. 546 F. Supp. at 1285. Football is the only sport in which the NCAA has completely regulated its members' broadcast rights. *Id.* at 1284.

18. 546 F. Supp. at 1283. From 1952 through 1957 the Football Television Committee of the NCAA retained the services of the National Opinion Research Center at the University of Chicago to study the effects of televised college football games on live gate attendance. The studies supported the belief that football attendance tended to decrease at games being played within the television viewing region. *Id.* In rejecting argument by the NCAA that television controls were necessary to protect live attendance at games, the district court questioned the reliability of the National Opinion Research Center studies because the studies failed to give due consideration to factors other than football telecasts which might have affected attendance at football contests. *Id.* at 1295.

19. *Id.* at 1283. The first controls limited television exposures to one game per week, permitted a team only one television appearance during the season, allowed the sponsors to select the game to be televised, and divided television revenue between the teams playing the game and the NCAA. *Id.* Under the present contracts, television network exposures have increased to 228 games per season, schools are permitted to appear on six network broadcasts every two years, and the number of networks broadcasting games has increased from one to three. *See id.* at 1291-93.

20. *Id.* at 1283. Fewer than 500 of the NCAA's 800 voting members have football programs; of that number only 187 are in Division I, which is comprised of the largest schools. *Id.*

21. *Id.*

22. *See id.* The district court noted that the NCAA's independent negotiation power has

football programs, including the University of Oklahoma and the University of Georgia, had become disenchanted with the inequities of the NCAA television regulatory scheme[23] and joined together to form the College Football Association (CFA) to represent their interests within the NCAA.[24] After attempts by the CFA to lobby within the NCAA proved ineffective, and efforts to negotiate a television contract independent of the NCAA were unsuccessful primarily because of NCAA threats,[25] the Universities of Oklahoma and Georgia brought suit in the United States District Court for the Western District of Oklahoma seeking to enjoin enforcement of the NCAA's television contracts.[26] The universities alleged that the NCAA regulations precluding member schools from independently negotiating the sale of football telecast rights violated the antitrust laws.[27]

B. *District Court Decision*

1. Standing

The District Court held that the plaintiff universities were subject to both direct and threatened antitrust injury, either of which was sufficient to confer standing to seek an injunction.[28] Injury-in-fact existed because the contracts entered into between the NCAA and the television networks for the years 1982-1985 threatened future revenues of the schools and the NCAA had manifested its willingness to enforce its exclusive marketing position by conduct harmful to the plaintiffs.[29] The fact that plaintiffs were seeking increased profits did not prevent characterizing their causal economic injury as antitrust injury.[30] Plaintiffs had therefore alleged both an existing controversy and existing antitrust injury, establishing the justiciability of their antitrust action.[31]

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been demonstrated through its acceptance of contracts contradicting general principles approved by the membership. *Id.*

23. *See id.* at 1285. In particular, the major football schools objected to equal division of television revenues with schools having less prestigious programs. For example, the Oklahoma/University of Southern California and Citadel/Appalachian State games were both broadcast on the same afternoon in 1981. Although the former was shown on over 200 stations and the latter on only four, each school received an identical fee for its broadcast rights. *Id.* at 1291.

24. *Id.* at 1285.

25. In 1981 the CFA contracted with NBC to televise football games. NBC rescinded the contract after most of the CFA members withdrew from participation in the contract under threat of sanctions by the NCAA. *Id.* at 1286.

26. *Id.* at 1286. 15 U.S.C. § 26 (1982) states in pertinent part: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws."

27. 546 F. Supp. at 1304.

28. *Id.* at 1302.

29. *Id.*

30. *Id.* at 1303. Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) held that plaintiffs must show they have can suffered "antitrust injury" before they could invoke federal antitrust laws. *See id.* at 489. "Antitrust injury" is a deleterious impact on a plaintiff's ability to reap the rewards of free competition. *See id.* at 486-89. Because the increased profits sought by plaintiffs would result from restoration of competition, the NCAA's restrictions on plaintiffs' current profitability constituted antitrust injury within the meaning of *Pueblo Bowl-O-Mat*. 546 F. Supp. at 1304-05.

31. 546 F. Supp. at 1304.

### 2. The Sherman Act: Per Se and Rule of Reason Analysis Under Section 1

Section 1 of the Sherman Act provides in part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[32] The Court recognized early on that Congress did not intend literal construction of section 1, because such a construction could conceivably invalidate all contracts.[33] Instead, courts "were expected to give shape to the statute's broad mandate by drawing on common-law tradition."[34] Responding to Congress' invitation, the Court developed the per se and rule of reason analytical approaches to application of section one.[35]

Per se analysis is applied to "naked" restraints of trade—restraints whose anticompetitive effects are apparent without extended analysis.[36] Proof that a defendant has engaged in a practice condemned by the per se rule establishes a Sherman Act violation; the plaintiff is not required to show that the defendant's use of the practice actually resulted in an unreasonable restraint on competition.[37] Rule of reason inquiry, conversely, mandates examination of whether a restraint in fact promotes, rather than suppresses, competition in a particular market environment.[38] Facts and circumstances surrounding the restraint should be considered in evaluating a restraint's effect.[39]

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32. 15 U.S.C. § 1 (1982).

33. *E.g.*, Board of Trade v. United States, 246 U.S. 231, 238 (1918).

34. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978).

35. *See, e.g., id.* at 692. The per se concept of illegality under the Sherman Act was first articulated in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). The "rule of reason" stems from early common law, *see* National Soc'y of Professional Eng'rs, 435 U.S. at 687-89 (citing Mitchell v. Reynolds, 24 Eng. Rep. 347 (1711)), and was quickly incorporated into section 1 of the Sherman Act. *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

36. Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) articulated the essence of the per se rule: "[C]ertain agreements or practices . . . because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Id.* at 5.

37. *Id.* at 5.

38. The classic formulation of the rule of reason was articulated by Justice Brandeis in Board of Trade v. United States, 246 U.S. 231 (1918). Writing for the Court, Justice Brandeis stated:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."

*Id.* at 238.

39. To determine [the unreasonableness of a restraint] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular restraint, the purpose or end sought to be attained, are all relevant facts.

*Id.* at 238. *Accord National Soc'y of Professional Eng'rs*, 435 U.S. at 692.

3. The District Court's Per Se Analysis: Price Fixing

The district court held, as its first ground of decision, that the NCAA's television controls constituted price fixing, a per se violation of section 1 of the Sherman Act.[40] Before examining the merits of the alleged per se violation, however, the court rejected the NCAA's argument that the amateur nature of college football required special antitrust treatment for the NCAA's restrictions.[41] Pointing to the huge sums involved in financing higher education and the intense (and professional) competition for those funds, the court found that it was "cavil to suggest that college football, or indeed higher education itself, is not a business."[42] Hence, the NCAA's conduct was evaluated under general antitrust principles.

Turning to the merits of the price-fixing claims, the district court found that the television package had literally fixed prices in two ways. First, the plan effectively dictated the price the networks would pay for each telecast.[43] Second, the plan dictated the price each school could receive for its telecast rights.[44] The court then observed that not all action literally fixing prices is considered "price fixing" for purposes of per se analysis.[45] In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[46] the Court had emphatically distinguished between literal price fixing and the "categories of business behavior to which the per se rule [against price fixing] has been held applicable."[47] Thus, the relevant inquiry in a case involving literal price fixing is whether the activity resulting in a fixed price for competitors' products is one which, on its face, leads to the reductions in competition and output which are characteristic of condemned price fixing arrangements.[48]

Following the guidelines of *Broadcast Music*, the district court proceeded to analyze the per se nature of the NCAA's marketing program. The NCAA likened its sale of its members' television rights to the blanket licensing agreements *Broadcast Music* excluded from per se treatment.[49] The defendants in *Broadcast Music* served as agents for licensing the performing rights to members' copyrighted material, issuing nonexclusive blanket licenses entitling licensees to unrestricted use of members' material.[50] Licensees were charged a single fee for a blanket license, regardless of the number of compositions used by the licensee and regardless of the number of times a particular composition was performed.[51] The Court declined to apply per se analysis to this licensing arrangement, despite acknowledging the presence of

40. *See* 546 F. Supp. at 1304-09.
41. *See id.* at 1288.
42. *Id.*
43. *Id.* at 1305. The district court's findings of fact detailed how the exclusive features of the plan, in conjunction with a contractually stated minimum total payment, operated to set an identical price for each televised game. *See id.* at 1289-90; 1292-94.
44. *Id.* at 1305. *See also id.* at 1292-94.
45. *Id.* at 1305.
46. 441 U.S. 1 (1979).
47. *Id.* at 9.
48. *Id.* at 20. *See* 546 F. Supp. at 1305.
49. 546 F. Supp. at 1306.
50. 441 U.S. at 5.
51. *Id.*

"literal" price fixing, because use of the blanket licenses did not facially appear to be a practice that would "always or almost always tend to restrict competition and decrease output."[52] The Court found that the blanket license was reasonably necessary to protect the federally-created right of copyright;[53] was necessary to create an efficient market for musical copyrights;[54] was, in a meaningful sense, a unique product;[55] and, importantly, the license did not preclude copyright owners or licensees from negotiating individual licensing arrangements.[56] Broadcast Music's joint license was therefore far from a "naked" restraint of the trade in copyrights; the license, and its "fixed price," were a good faith and facially reasonable response to unique market problems.[57] Per se treatment was therefore inappropriate.[58]

The district court rejected the NCAA's analogy to *Broadcast Music* for several reasons. Significantly, marketing exigencies did not require schools to cooperate beyond agreeing to play a particular game.[59] Joint sale of television rights was therefore not a joint venture necessitated by marketing realities, but was merely a device restricting output by limiting the number of games available for broadcast and fixing the price for those games.[60] Additionally, football telecast rights were not a property right existing as a result of federal law, thereby eliminating any quasi-presumption in favor of the NCAA's restrictions.[61] The most important distinction for the district court, however, was the inability of NCAA members to negotiate individual sales of their television rights.[62] This feature rendered the plan more like a horizontal price fixing agreement than a true joint venture.[63]

Given the overwhelming marketing restrictions created by the NCAA's price fixing program, per se treatment was required.[64] Having found per se treatment appropriate, under *Arizona v. Maricopa County Medical Society*[65] the NCAA's procompetitive justifications for price fixing were not relevant.[66] Quoting *Maricopa County*, the court stated:

The respondents' principal argument is that the per se rule is inap-

52. *See id.* at 20-23.

53. *Id.* at 18-19.

54. *Id.* at 20. The blanket license created an efficient market by eliminating the prohibitive costs forseeable if every copyright use had to be individually negotiated, by minimizing the risk of copyright infringement, and by providing an effective means for enforcing a copyright's exclusivity. *Id.* at 20-21.

55. *Id.* at 21-22.

56. *Id.* at 23-24.

57. *See id.* at 24.

58. *Id.*

59. 546 F. Supp. at 1306.

60. *Id. See also. id.* at 1307 (joint license at issue in *Broadcast Music* was a necessary means for marketing copyrighted musical compositions).

61. *Cf. id.* at 1306 (noting that *Broadcast Music* found it anomalous to characterize a marketing arrangement necessary to protect a federal property right as a per se violation of federal antitrust law; *see Broadcast Music*, 441 U.S. at 18-19).

62. 546 F. Supp. at 1308.

63. *See id. Cf. Broadcast Music*, 441 U.S. at 23 (freedom to sell copyright outside license arrangement indicated that blanket license was not "simple horizontal arrangement among competitors").

64. 546 F. Supp. at 1308.

65. 457 U.S. 332 (1982).

66. 546 F. Supp. at 1308.

> plicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the per se concept. The anticompetitive potential inherent in all price fixing arrangements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application.[67]

Having rejected the NCAA's argument that its marketing arrangement was facially legitimate, the district court considered the NCAA's contention that the television controls properly escaped per se analysis because they were merely ancillary to NCAA regulations related to player recruitment, playing rules, amateurism, and player grants-in-aid.[68] According to the NCAA, as ancillary restraints the television marketing controls could not be treated as intrinsically anticompetitive restraints, and were therefore not properly subjected to per se treatment.[69]

The court set forth the elements of the ancillary restraint doctrine as 1) proof that a particular restraint is reasonably necessary to accomplish an arrangement's legitimate purposes, and is no broader than reasonably necessary; 2) the absence of unreasonable anticompetitive effects; and 3) imposition by a party or parties lacking monopoly power.[70] Applying the test it had articulated, the court rejected the NCAA's ancillary restraint argument. As a threshold matter, the NCAA failed to provide any evidence explaining *why* its marketing monopoly was necessary to effect its overall regulatory program.[71] Further, the NCAA enjoyed sufficient noncommercial controls to accomplish its legitimate purposes without regulating football telecasts.[72] Finally, the NCAA could not be permitted to restrain the success of some market participants in order to ensure a viable market for others; the Sherman Act required that free competition rule the marketplace.[73] For all the above reasons, the television plan did not qualify as a permissible "ancillary restraint."[74]

4. The District Court's Per Se Analysis: Group Boycott

The plaintiffs also argued that the NCAA's television controls were illegal as a group boycott.[75] The district court agreed, holding that the controls constituted a group boycott under several theories. First, because coopera-

67. *Id.* (quoting *Maricopa County*, 457 U.S. at 351).
68. 546 F. Supp. at 1309.
69. *Id.*
70. *Id.* at 1309 (citing United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); United States v. Columbia Pictures Corp., 189 F. Supp. 153, 185-92 (S.D. N.Y. 1960)). *See generally* Harrison, *Price Fixing, The Professions, and Ancillary Restraints: Coping with* Maricopa County, 1982 U. ILL. L. REV. 926; Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do* Sealy *and* Topco *Logically Survive* Sylvania *and* Broadcast Music? 66 VA. L. REV. 879 (1980).
71. 546 F. Supp. at 1309.
72. *Id.* at 1310.
73. *Id.*
74. *Id.* at 1311.
75. *Id.*

tion among producers was necessary to compete in the market, the producers' agreement not to trade with non-NCAA producers (non-NCAA schools) constituted a group boycott.[76] Second, the producers' agreement not to trade with networks not selected by the NCAA constituted a horizontal agreement not to deal with specified buyers.[77]

5. District Court's Rule of Reason Analysis

Following its per se analysis of the television controls the court examined the controls under the rule of reason, in the interests of litigation efficiency.[78] As described above, rule of reason analysis is limited to ascertaining whether a restraint either promotes or suppresses competition.[79] A restraint's impact on competitive conditions[80] is evaluated by considering both the nature or character of the restraint and the intent underlying the restraint, as manifested in the history and circumstances surrounding the restraint.[81] Either inquiry may lead to characterization of a restraint as unreasonable.[82] The district court found the television controls unreasonable, and therefore illegal, under both branches of the test.[83]

By regulating the number of games telecast, the price for broadcast rights, and the ability of traders (schools) to choose their trading partners, the NCAA controls were unreasonable in character.[84] Further, the lack of responsiveness to consumer (*i.e.* viewer) preference was highly offensive; this fact clearly illuminated the market restrictions embodied in the controls.[85] Given the NCAA's inability to prove that the restraints in fact had redeeming procompetitive benefits sufficient to mitigate the facial unreasonableness

76. *Id.* at 1311-12 (citing Associated Press v. United States, 326 U.S. 1 (1945)). *Associated Press* involved an agreement among newspapers (producers) not to sell their product (news) to non-combine newspapers. 326 U.S. at 8-9. The Court found the arrangement illegal under section 1, although the agreement was not explicitly characterized as a per se group boycott. *See id.* at 18-19. *See also* Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656, 659-60 (1961) (conspiratorial refusal to supply necessary competitive input to competitor on same market tier of some conspirators stated per se claim).

77. 546 F. Supp. at 1313. The court recognized that most per se group boycotts involved horizontal conspiracies affecting competitors on the conspirators' market tier, but held that because the effects of the NCAA's exclusive contract were indistinguishable from the effects of a classic horizontal boycott the per se rule was applicable. *Id. Cf.* Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979) (per se boycott present because of market effects even though there was no numerosity of actors on either market tier).

78. 546 F. Supp. at 1314.

79. *See supra* notes 38-39 and accompanying text.

80. Noneconomic justifications or effects are irrelevant in evaluating a restraint's reasonableness. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 689-92 (1978).

81. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 690 (1978); Board of Trade v. United States, 246 U.S. 231, 238-39 (1918); Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911).

82. *National Soc'y of Professional Eng'rs*, 435 U.S. at 692.

83. 546 F. Supp. at 1315.

84. *Id.* at 1317-19.

85. *See id.* at 1319. The court stated:

> Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls. Many games for which there is a larger viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised.

*Id.*

of the restraints,[86] the NCAA's television program was illegal under the rule of reason.[87]

Similarly, the intent underlying the controls, as indicated by their historical development and manner of implementation, was anticompetitive, thereby rendering the controls unreasonable.[88] The court concluded that the purpose of the regulations was "to enhance the television revenues of less prominent football-playing schools" at the expense of the major football powers, and to provide income to the NCAA.[89] The court rejected arguments that the primary purpose of restricting telecasts was to maintain live gate attendance,[90] and that the controls were properly ancillary to the NCAA's noneconomic goals.[91] Finally, the NCAA's concern with establishing exclusive power over its members' football television rights was not manifested until CFA members attempted to exercise control over their television rights, shedding further doubt on the NCAA's asserted altruistic purpose in controlling football rights.[92]

6. The Sherman Act: Monopolization Under Section 2

A two-step inquiry was conducted into plaintiffs' allegations that the NCAA had monopolized the college television market in violation of section 2 of the Sherman Act.[93] After defining the relevant product market to be college football television,[94] the court found that the NCAA had monopolized the market.[95]

The NCAA had contended that college football television did not constitute a separate market because the economic characteristics of the alleged market were inconsistent with a monopoly scenario,[96] and because other television programming could be readily substituted for college football telecasts.[97] Within the larger market consisting of all television broadcasts, the NCAA would not have market power, and therefore could not have engaged in monopolization.[98] The court rejected the NCAA's arguments.

86. The court found that the restraints had enhanced neither live viewership nor competitive balance. *Id.*

87. *Id.*

88. *Id.* at 1317.

89. 546 F. Supp. at 1315.

90. While this purpose may have originally motivated the NCAA, the NCAA's modern television program evinced little concern for protecting live attendance. For example, the latest network contracts provide for up to nine hours of football telecasts on Saturday afternoons, and also require the networks to telecast more games than would be shown in an unrestricted market. *Id.*

91. *Id.* at 1316. The court found that the television restrictions made little, if any, contribution to preserving competitive balance. Further, the television contracts restricted the commercial activities of NCAA members, not the actual specifics of competition. *Id.*

92. *See id.* at 1316-17.

93. 15 U.S.C. § 2 (1982). This section states in relevant part "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." *Id.*

94. 546 F. Supp. at 1319-23.

95. *Id.* at 1323-24.

96. *See id.* at 1319-20.

97. *See id.* at 1320-23.

98. *See id.* at 1321.

Expert economic testimony supporting the NCAA was rejected because production in the college televised football market was not a function of marginal cost; games were played regardless of incremental increases in television revenue.[99] Hence, the NCAA's micro-economically based marketing analysis was inherently flawed.[100] Further, the market for televised football had never existed without the presence of NCAA controls. Thus, comparing the actual price and output behavior of televised football with behavior theoretically forseeable in a monopolized market was irrelevant; the significance of actual behavior could not be evaluated except in terms of a controlled market.[101]

Having rejected the NCAA's attempt to theoretically define the relevant market, the court examined evidence of college football's actual interchangeability of with other television programming. The court concluded that televised college football was a separate market because other television programming was not in fact readily interchangeable with college football.[102] The court found that the NCAA was able to increase the price for college football telecasts dramatically without a corresponding increase in output (*i.e.*, the number of games telecast).[103] Similarly, advertisers allocated a disproportionate share of their total advertising budgets to college football broadcasts.[104] These two factors led the court to hold that the relevant market was college football broadcasts.[105]

Once the relevant market was defined, the court had little trouble finding that the NCAA had monopoly power within that market: the NCAA

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99. *Id.* at 1319.

100. *Id.* at 1320.

101. *Id.*

102. *Id.* United States v. E. I. Dupont de Nemours & Co., 351 U.S. 377 (1956) held that the relevant market for evaluating monopoly power should be determined by considering the degree to which other products were readily substitutable for the allegedly monopolized product. *See id.* at 393, 400.

103. In 1981, ABC paid $31 million for 24 broadcast exposures. In 1982, ABC and CBS paid $59 million for 28 similar exposures, a 62% price increase in the cost of a broadcast. By 1985, the networks will pay $72 million for 28 exposures. 546 F. Supp. at 1322. The court found that "no other network programming, with the possible exception of professional football, . . . could command such a dramatic price increase with so small an increase in output." *Id.*

104. *See id.* at 1321. The court also noted the networks' belief that they would be able to increase the price of advertising on college telecasts to correspond with the increased cost of purchasing the football rights, and found this an additional indicium of college football's unique market status. *Id.* at 1323.

105. *Id.* at 1323. The court stated:

> In a sense, it is difficult to understand the tremendous appeal of college football to the networks and their advertisers. Certainly the color, pageantry and tradition of the sport, and the interest of alumni in the sport, are significant factors. *Whatever the reason, it is clear that there is no substitute in the minds of the networks and advertisers.* They pay an enormous cost to reach an audience which is small relative to prime time programming. The networks are willing to allow NCAA to substantially dictate the conditions under which they may televise college football. The networks may even be willing to lose money on college football in return for some intangible benefits they believe themselves to derive from merely being associated with the sport. It is clear that college football does not compete with other television programming in any real sense, that it is a market unto itself, and that it is the relevant market for determining whether NCAA exercises monopoly power.

*Id.* (emphasis supplied).

clearly exercised uncontested control of college television broadcasts.[106] Because the NCAA had used its monopoly power to erect barriers to entry and engaged in other anticompetitive conduct, it had monopolized the college television football market.[107]

### C. *Tenth Circuit Decision*

The NCAA appealed the substantive aspects of the district court's decision regarding standing, the illegality of the television controls under per se and rule of reason analysis, and the existence of a group boycott.[108] In a decision written by Judge Logan, the Tenth Circuit held that the Universities of Oklahoma and Georgia suffered the type of injury conferring antitrust standing;[109] that the controls constituted illegal price fixing under both per se[110] and rule of reason analysis;[111] and that the controls did not constitute a per se group boycott.[112] Judge Barrett filed a dissenting opinion.[113]

#### 1. Standing

The court held that the Universities of Oklahoma and Georgia had standing to attack the television controls as a horizontal price fixing conspiracy.[114] Many of the injuries alleged by the plaintiffs related to restrictions on their trading freedom, and were thus more analogous to the injuries flowing from vertical restraints than to the decreased output and price enhancement injuries traditionally associated with cartelization.[115] The court relaxed the rigors of the standing inquiry, however, because the plaintiffs sought only injunctive relief.[116] Given the relaxed procedural posture and the fact that plaintiffs' injuries were "inextricably intertwined" with the alleged horizontal conspiracy, plaintiff's had standing to challenge the NCAA's practices as horizontal price fixing.[117] The Tenth Circuit also found that the plaintiffs had standing to challenge the plan's other provisions.[118]

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106. *Id.* at 1323. *Cf.* United States v. E. I. DuPont de Nemours & Co., 351 U.S. 377, 394 (1956) (monopoly power found in relevant market consisting of single product).

107. 546 F. Supp. at 1323.

108. Board of Regents v. National Collegiate Athletic Association, 707 F.2d 1147, 1150 (10th Cir.), *cert. granted*, 104 S. Ct. 272 (1983). The NCAA also appealed the district court's market definition, but this issue was not addressed by the Tenth Circuit. 707 F.2d at 1159 n.16. Additionally, the Tenth Circuit granted the NCAA's request to modify the scope of the injunctive relief granted by the court. *See id.* at 1162.

109. 707 F.2d at 1152.

110. *Id.* at 1156.

111. *Id.* at 1160.

112. *Id.* at 1161.

113. *Id.* at 1162 (Barrett, J., dissenting).

114. *Id.* at 1152.

115. *Id.* at 1151.

116. *Id.*

117. *Id.*

118. *See id.* at 1152. The court rejected the NCAA's contention that the plaintiffs' participation in the conspiracy barred standing to challenge the legality of the conspiracy's restraints. *Id.* at 1151-52 (quoting Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139-40 (1968)).

2. Per Se Analysis

Like the district court, the Tenth Circuit recognized that under *Broadcast Music* the NCAA's literal price fixing might not be subject to per se treatment.[119] Judge Logan stated, however, that characterizing a horizontal relationship as an integration necessary to effect market efficiencies was not in itself sufficient to invoke rule of reason analysis.[120] Rather, the proper inquiry to determine the appropriateness of per se treatment was whether the marketing integration's restraints, considered facially, would inevitably tend to suppress competition.[121] Under this standard, the television program's price-fixing effect could escape per se treatment only if the program could satisfy two tests. First, the underlying integration must itself be capable of increasing market efficiency.[122] Second, the restraint must be "capable of increasing the effectiveness of [the integration] and no broader than necessary for that purpose."[123]

The court's per se analysis began by addressing the NCAA's argument that the television controls were ancillary to the NCAA's function as a cooperative rulemaking and rule-enforcing body.[124] Essentially, the court treated the NCAA as asserting that its function was to ensure the continued viability of amateur college in order to increase viewership, which was the "output" of the college football industry.[125] Thus, if the television restraints protected or increased viewer interest in college football, they were properly ancillary to the NCAA's rulemaking function.[126]

Viewership "output" allegedly consisted of two discrete products: the right to view a game in person, and the right to televise the game.[127] By limiting the number of broadcasts the live attendance component of output was increased, enhancing the efficiency of the market.[128] The Tenth Circuit disagreed with the NCAA's analysis, concluding that even if viewership was the relevant product, live viewership could not be segmented from overall viewership.[129] No record evidence established that overall viewership was enhanced by the controls.[130] Further, the record showed that serious market distortions accompanied a system enhancing live viewership by restricting

119. 707 F.2d at 1152.

120. *Id.*

121. *Id.* (quoting Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 19-20 (1979)). The Tenth Circuit rejected the United States' amicus argument that facial examination of the ancillary controls under the promotion of/suppression of competition standard was inconsistent with per se inquiry. The potential procompetitive benefits of integrating production activities required some degree of inquiry beyond merely identifying the objective effects of a restraint. Hence, facial consideration of pro-competitive justifications for restraints accompanying an integration was consistent with per se analysis under *Broadcast Music*. 707 F.2d at 1152 n.6.

122. 707 F.2d at 1153. *See Broadcast Music*, 441 U.S. at 21-23.

123. 707 F.2d at 1153 (quoting R. BORK, THE ANTITRUST PARADOX 279 (1978)).

124. *See* 707 F.2d at 1153.

125. *See id.*

126. *See id.*

127. *Id.* at 1154.

128. *Id.*

129. *Id.*

130. *Id.*

television viewership.[131] Thus, the television program's direct viewership effects did not support characterizing the program as an ancillary restraint to an acceptable marketing integration.[132]

Additionally, the asserted purpose of maintaining competitive balance among the various NCAA members' football teams did not enable the television controls to be deemed an ancillary restraint.[133] Noneconomic justifications for restraints were irrelevant in assessing a restraint's competitive consequences.[134] Further, the Sherman Act did not countenance a restriction designed to protect a market by limiting competition.[135] Finally, the court noted that less restrictive means were available to the NCAA for promoting its parity goals.[136]

The NCAA's second argument characterized the television controls as ancillary to an integrated marketing arrangement.[137] Including price and output restraints in the television contracts was allegedly necessary in order to market college football as a television series in competition with entertainment series like "Dallas."[138] In effect, the television controls "restrain[ed] intrabrand competition (competition among football games) in order to stimulate interbrand competition (competition between NCAA football and other entertainment programming)."[139] The court declined to explore this argument, however, because it found that the marketing integration was itself a per se violation;[140] a fortiori, the restraints accompanying the intergration were impermissible.[141]

The joint marketing arrangement was impermissible because of its overwhelming anticompetitive potential. The joint marketing program created no new product similar to the blanket license at issue in *Broadcast Music*: the NCAA license merely provided a single product on an exclusive basis.[142] Also, unlike the license in *Broadcast Music*, the television plan did not permit individual sales by the combination's members,[143] thereby creating a significant risk of cartelization.[144] Finally, the *Broadcast Music* joint license was nonexclusive; the seasonal exclusivity of the NCAA's plan operated to exclude forseeable purchasers for single game rights, potentially permanently foreclosing many broadcasters from entering the televised football market.[145] Taken in its entirety, the NCAA's joint marketing program facially

131. *Id.* The television program reduced output of desired products (by restricting the games which could be televised), and increased consumption of less desirable products (by requiring minor games to be televised). *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (citing *National Soc'y of Professional Eng'rs*, 435 U.S. at 687-96).

135. 707 F.2d at 1154 (citing *National Soc'y of Professional Eng'rs*, 435 U.S. at 689, 696).

136. 707 F.2d at 1154.

137. *Id.* at 1155.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 1155 n.14. *See also supra* note 124 and accompanying text.

142. *Id.* at 1156. *See Broadcast Music*, 441 U.S. at 21-22 (joint license was "truly greater than the sum of its parts").

143. 707 F.2d at 1156.

144. *Id.*

145. *Id.*

tended to reduce competition and output.[146] Hence, the NCAA's price-fixing plan was one of those forms of business behavior constituting a per se violation of the Sherman Act.[147]

2. The Tenth Circuit's Rule of Reason Analysis

Although they found the television program to be invalid per se, the majority examined the program under the rule of reason because of the prospect of Supreme Court review.[148] The analysis, which concentrated on the controls' anticompetitive impact rather than the NCAA's anticompetitive purpose,[149] began by assessing the trading irregularities resulting from the controls.[150] Market concentration resulted because participants were limited to one seller (the NCAA) and three buyers (ABC, CBS, and Turner).[151] The NCAA's contracts also limited price competition among those buyers.[152] The contracts therefore resulted in vertical foreclosure of buyers, and the inability of sellers (NCAA members) to freely sell their television rights.[153] The court found that these obvious results of the NCAA plan were not, however, the plan's only anticompetitive effects.[154]

The horizontal aspect of the NCAA's plan created the risk that, if the NCAA possessed market power, the plan could result in artificial price enhancement.[155] Similarly, the vertical foreclosure aspects of the plan would have anticompetitive consequences among the class of potential purchasers if college football was in fact not a readily interchangeable product.[156] By analyzing the NCAA's market power, the court would be able to assess the full competitive impact of the plan.[157]

NCAA market power was established by pointing to the large audience share and high cost per advertising minute commanded by college football telecasts on Saturday afternoons.[158] The NCAA's plan therefore manifested

146. *Id.*

147. *Id.*

148. *Id.* at 1157.

149. The court agreed that the two-prong rule of reason inquiry, *see supra* notes 79-82 and accompanying text, was proper, but did not investigate the purposes underlying the restraints. *See* 707 F.2d at 1157-60.

150. 707 F.2d at 1157.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *See infra* notes 158-65 and accompanying text.

156. 707 F.2d at 1157.

157. The price enhancement risk would become apparent because market power involves the power to control prices or exclude competition. United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 391 (1956). The vertical foreclosure risk would become apparent because market power only exists when price rises of a product do not cause significant purchases of a reasonably substitutable product. *Id.* at 404. Thus, if market power existed, vertical foreclosure would be present. *See* 707 F.2d at 1157-58.

158. 707 F.2d at 1158-59. The court observed that even if its definition of the relevant market was underinclusive, the prejudicial impact of that error could be obviated by attributing less significance to market power when evaluating the plan's anticompetitive effects. *Id.* at 1159 (citing L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 17, at 61 (1966)). Similarly, the court noted that the degree of market power necessary to find a violation of section 1 under the rule of reason is less than that necessary under section 2 monopolization analysis. 707 F.2d at 1159.

the anticompetitive risks stemming from a finding of market power.[159] In light of the anticompetitive risks stemming from NCAA market power, the existence of market-neutral means of preserving competitive balance,[160] the elimination of intrabrand price competition,[161] and the NCAA's coercive seizure of its members television rights,[162] the plan was unreasonably anticompetitive and therefore illegal under the rule of reason.[163]

3. The Tenth Circuit's Group Boycott Analysis

The Court of Appeals reversed the lower court on the issue of group boycott. No per se boycott existed with respect to the broadcasters because the broadcasters were not in a horizontal relationship with the NCAA members.[164] Enforcement of NCAA policies through threat of sanctions against NCAA members also was not a per se boycott.[165] The court held that an expulsion imposed as part of associational discipline was not a per se boycott unless the expulsion was "a naked attempt to exclude competition."[166] Absent such a facially anticompetitive purpose, an associational sanction's legality was assessed by examining its competitive reasonableness.[167] Because the NCAA's expulsion mechanism was not facially unreasonable, the lower court's per se ruling was reversed;[168] because the plan had already been held illegal, the court did not consider the reasonableness of the expulsion mechanism.[169]

4. Judge Barrett's Dissent

Judge Barrett would have reversed the district court.[170] He argued that the lower court erred in applying per se analysis because the NCAA's noneconomic purposes[171] required deferential treatment of NCAA regula-

159. 707 F.2d at 1159. *See supra* note 157.
160. 707 F.2d at 1159.
161. *Id.*
162. *See supra* notes 83-92 and accompanying text.
163. *See* 707 F.2d at 1159.
164. *Id.*
165. *Id.* at 1160-61. The court distinguished the authorities the lower court relied on in finding a group boycott of the networks:

> In Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), a retailer induced wholesalers and manufacturers to refuse to supply its competitor. In Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457 (1941), clothing manufacturers organized a boycott of retailers who dealt in the clothing of competing manufacturers. In Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), manufacturers of gas heaters coerced an adverse "seal of approval" decision with regard to the product of a competitor. Each of these cases reflects conduct by one firm inducing concerted action to deprive competing firms of necessary trade relationships, *a characteristic absent here*.

707 F.2d at 1161 (emphasis supplied).
166. 707 F.2d at 1161.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 1162 (Barrett, J., dissenting).
171. Judge Barrett found the NCAA's primary purposes to be maintenance of the amateur nature of the NCAA members' sports programs and ensuring that college athletes were integrated into a university's academic life. *Id.* at 1163.

tions affecting its members' commercial activities.[172] Judge Barrett maintained that the television controls should have been analyzed under the rule of reason.[173] The dissent found that the controls were properly ancillary to the noneconomic purposes of the NCAA, and were therefore acceptable under the rule of reason.[174]

Judge Barrett's rule of reason conclusion was based on the lack of proof that the controls injured the consumer public,[175] his finding that overall viewership was increased by the controls,[176] and his finding that the regulations operated to ensure the amateurism of NCAA football programs and the academic achievement of NCAA members.[177] In sum, Judge Barrett found the NCAA to be a joint venture[178] whose division of television revenues among member schools was similar to the division of profits by a law partnership,[179] and whose noneconomic motivations precluded a finding that its television restrictions had the "pernicious effects" on competition condemned by the antitrust laws.[180]

### D. *Section 1 Analysis Under the Burger Court*

Burger Court decisions have lacked consistency in their approach to section 1 analysis.[181] In 1972, with virtually no accompanying economic analysis, the Court applied the per se rule to a horizontal allocation of territories in *United States v. Topco Association, Inc.*[182] Topco was a cooperative buying association for small and medium sized independent grocery store chains which granted its retailer members exclusive territories in which to sell Topco's private-label products.[183] The Court characterized the arrangement as a horizontal restraint, and therefore a per se violation of section 1, without first considering the potential impact on competition.[184]

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172. *See id.* at 1164 (distinguishing between amateur and professional sports); *id.* at 1165 (trial court's characterization of NCAA as business failed to recognize NCAA's primarily noneconomic purpose); *see also id.* at 1167 (per se rule has only been held applicable to business enterprises operated exclusively for profit; NCAA rules not within per se category because not designed to "render greatest profit for *business purpose*") (emphasis in original).

173. *Id.* at 1165.

174. *Id.* at 1167 (Barrett, J., dissenting).

175. *Id.* at 1168.

176. *Id.* at 1167. *But see id.* at 1154 (Logan, J.) (no evidence plan enhanced overall viewership).

177. *Id.* at 1167.

178. *Id.* at 1168.

179. *Id.*

180. *Id.*

181. *See generally Recent Antitrust Developments*, 80 COLUM. L. REV. 1, 13-26 (1980). *See also* Gehart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319. Professor Gehart's thesis is that the Supreme Court came close to embracing the Chicago school's approach to antitrust analysis following United States v. Topco Assoc., Inc., 405 U.S. 596 (1972), but pulled back in Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982). Gehart, *supra*, at 319-20. Under the Chicago school's analysis, per se rules should only be applied after scrutinizing the consumer welfare effect of challenged behavior. *Id.* at 321.

182. 405 U.S. 596 (1972).

183. *Id.* at 601-03.

184. *See id.* at 608-09. Chief Justice Burger, in dissent, stated that "the Court does not tell us what 'pernicious effect on competition' the practices here outlawed are perceived to have; nor

Chief Justice Burger did not agree that merely characterizing Topco's conduct as a horizontal restraint justified application of a per se rule.[185] In a vigorous dissent, he rebuked the majority for failing to apply economic analysis, stating that "the judicial convenience and ready predictability that are made possible by per se rules are not such overriding considerations in antitrust law as to justify their promulgation without careful prior consideration of the relevant economic realities in the light of the basic policy and goals of the Sherman Act."[186]

Following *Topco*, the Supreme Court decided a series of cases in which the per se rule either was not applied, or was applied only after injection of economic analysis. *National Society of Professional Engineers v. United States*[187] is representative of that line of cases.[188] At issue in *Professional Engineers* was whether a provision in the Society's Code of Ethics was unlawful suppression of competition under section 1 of the Sherman Act.[189] The provision prohibited member engineers from negotiating the price of a project until a prospective client had selected an engineer, rendering price comparison by the client impossible.[190] The Society justified the restriction on the grounds that price competition would result in inferior work, ultimately endangering the public.[191] The Court rejected the public safety argument, reasoning that the only permissible inquiry was economic, and involved examination of a practice's competitive impact.[192] Following a cursory economic analysis of the restraint,[193] the Court held that the Code of Ethics restrained competition in violation of the rule of reason.[194]

The Court's next major treatment of the role of economic analysis was in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[195] *Broadcast Music* explicitly cautioned against applying per se characterization without examining the economic reality of a challenged restraint.[196] Only after extensive economic analysis[197] did the Court conclude that per se treatment was inappropriate.[198]

Then, in *Arizona v. Maricopa County Medical Society*,[199] the Court appar-

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does it attempt to show that those practices 'lack. . .any redeeming virtue.' " *Id.* at 622 (Burger, C.J., dissenting).

185. *Id.* at 614 (Burger, C.J., dissenting).

186. *Id.* at 614-15.

187. 435 U.S. 679 (1978).

188. Other cases include Catalano, Inc. v. Target Sales, Inc., 466 U.S. 63 (1980); Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

189. 435 U.S. at 683. Section 11 of the Code provided in part that: "The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding." *Id.* at 683 n.3.

190. 435 U.S. at 684.

191. *Id.* at 684-85.

192. *Id.* at 692.

193. *See id.* at 692-93.

194. *See id.* at 681, 696.

195. 441 U.S. 1 (1979).

196. *Id.* at 8-9.

197. *See id.* at 10-24.

198. *See id.* at 23-24.

199. 457 U.S. 332 (1982).

ently applied the per se rule in a manner reminiscent of *Topco*. Approximately seventy percent of the doctors in Maricopa County were members of the Maricopa Foundation for Medical Care, and agreed to abide by the Foundation's schedule of maximum fees for providing services to policyholders of specific insurance plans.[200] In reversing denial of Arizona's motion for summary judgment, the Supreme Court held that the maximum fee agreements were per se unlawful price fixing, despite the fact that discovery was incomplete.[201] In apparent retreat from *Broadcast Music*, the Court declined to consider competitive impact once the fee schedule was characterized as price fixing.[202] *Broadcast Music* was distinguished as a case involving joint effort creating a new product, rather than as establishing a new methodology for examining the per se nature of a combination among horizontal market participants.[203]

Justice Powell dissented, joined by Chief Justice Burger and Justice Rehnquist.[204] Arguing that a sufficient factual record had not been developed, Justice Powell rebuked the majority's failure to engage in the economic analysis required by *Broadcast Music*.

> Before characterizing an arrangement as a per se price fixing agreement meriting condemnation, a court should determine whether it is a 'naked restrain(t) of trade with no purpose except stifling of competition.' . . . Such a determination is necessary because 'departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.'[205]

In light of the Burger Court's fluctuating approach to economic analysis, the Tenth Circuit's holding that the television controls are per se illegal cannot be said to reflect an inconsistency with the Burger Court's line of cases. In *Board of Regents*, the Tenth Circuit's depth of economic analysis prior to invoking the per se rule exceeded that found in *Maricopa County*, following more closely the *Broadcast Music* methodology. On review, the Supreme Court will have an opportunity to clarify whether the somewhat mechanical *Maricopa County* approach has supplanted the more flexible analysis of *Broadcast Music*. Even if the Court chooses to rely on *Maricopa County*'s relative trivialization of *Broadcast Music*,[206] *Board of Regents* clearly provides the Court with an opportunity to clarify the scope of the ancillary restraint doctrine and the per se rule in the context of an integrated marketing arrangement involving horizontal competitors.

Two additional aspects of *Board of Regents* deserve mention. First, it is unlikely that the Court will adopt Judge Barrett's "partial exemption" approach to NCAA activities;[207] the Burger Court's decisions indicate an intent to require Congress to make exceptions to the operation of the antitrust

200. *Id.* at 339.
201. *Id.* at 356.
202. *Id.* at 351.
203. *Id.* at 355-56.
204. *Id.* at 357 (Powell, J., dissenting).
205. *Id.* at 362 (citations omitted).
206. *See supra* note 203 and accompanying text.
207. *See supra* notes 171-72 and accompanying text.

laws.[208] Second, the Supreme Court has hinted that rule of reason analysis may be appropriate where buyer and seller have comparable market power.[209] If the Court finds that the television networks comprised a monopsony, perhaps the television controls will escape per se condemnation through a new modification of the per se rule.

## II. DISCOUNT FUNDING AND RESALE PRICE MAINTENANCE: THE COERCIVE ESSENTIAL

Midwest, the exclusive Denver area distributor for Joseph E. Seagram and Sons, Inc.,[210] independently decided to discount the price of Seagram products to selected high volume liquor retailers in an effort to increase the competitiveness of Seagram products.[211] Seagram subsequently agreed to Midwest's request for reimbursement of the discounts, stipulating, however, that the discounts be passed through to the participating high volume retailers.[212] On appeal,[213] nineteen small retailers who were not permitted to participate in the discount program alleged that Seagram's agreement with Midwest constituted illegal vertical price fixing (resale price maintenance), which was a per se violation of section 1 of the Sherman Act.[214] Appellants argument, in its essence, was that because the record established that participants on two levels of a market had entered into an agreement affecting resale prices, a per se violation had been established as a matter of law.[215]

The Tenth Circuit began its analysis by explaining that although resale price maintenance agreements were per se unlawful, not every vertical agreement with a resale price effect constituted resale price maintenance.[216] The sine qua non of a resale price maintenance agreement was coercive action by the manufacturer or other upper tier market participant.[217] Unless the lower tier participant was coerced into selling at a price dictated by the upper tier participant, resale price maintenance was not present.[218]

Appellants argued that the coercion element was satisfied because Seagram required Midwest to pass the funded discount through to its customers.[219] The Tenth Circuit disagreed because the passthrough requirement

208. *See, e.g., Maricopa County*, 457 U.S. at 355, *National Soc'y of Professional Eng'rs*, 435 U.S. at 692.

209. *Maricopa County*, 457 U.S. at 354 n. 29. *See also* Harrison, *Price Fixing, The Professions, and Ancillary Restraints: Coping with* Maricopa County, 1982 U. ILL. L. REV. 925, 943.

210. AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc. 705 F.2d 1203, 1204 (10th Cir.), *cert. denied*, 103 S. Ct. 1903 (1983).

211. 705 F.2d at 1204.

212. *Id.* at 1205.

213. The district court found that Seagram's conduct constituted neither a per se nor rule of reason violation of section 1 of the Sherman Act. *Id.* at 1204, 1208.

214. *Id.* Combinations between suppliers and distributors setting resale prices have long been recognized to be a per se violation of section 1 of the Sherman Act. Albrecht v. Herald Co., 390 U.S. 145, 153 (1968). *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408-09 (1911).

215. *See* 705 F.2d at 1205.

216. *Id. Cf.* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 9 (1979) (all horizontal agreements literally fixing prices are not per se price fixing violations).

217. *See* 705 F.2d at 1206.

218. *Id.*

219. *Id.*

did not, in and of itself, force Midwest to set a specific resale price.[220] Midwest was not precluded from setting a price reflecting a discount greater than that Seagram had agreed to support, nor was Midwest required to offer a discounted price.[221] Further, there was no evidence that retailers receiving Midwest's discount were required or forced to sell at a certain price.[222] Hence, Seagram had not engaged in retail price maintenance.[223]

Plaintiffs then argued that even if the discount agreement did not constitute resale price maintenance, it was nonetheless a per se violation under *United States v. Socony-Vacuum Oil Co.*,[224] which held that a per se violation of its antitrust laws is present when a combination is formed "for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity."[225] In rejecting this argument, the court limited *Socony-Vacuum* to agreements arising in the context of a horizontal conspiracy.[226] Vertical arrangements between manufacturers and wholesalers or wholesalers and retailers which affected price did not manifest the anticompetitive dangers found in horizontal agreements, and thus were not per se violations.[227]

Having rejected the asserted bases for per se characterization, the Tenth Circuit held that the lower court's rule of reason analysis properly found that the discount program was acceptable.[228] Evidence showed that the intent and effect of the program were to increase interbrand competition by lowering retail prices.[229] Because the restraints created by the program tended to increase interbrand competition and were not manifestly anticompetitive,[230] the trial court had correctly ruled that no section 1 violation was present.[231]

## III. Elements of Section 2 Offenses: Tenth Circuit Definitions

Olsen was a retailer of musical instruments who brought an action against competing retailers, suppliers, and manufacturers of musical instruments, alleging a conspiracy to restrain trade, fix prices, boycott Olsen, and commit other unfair practices in violation of section 1 of the Sherman Act, and attempted monopolization and conspiracy to monopolize in violation of section 2 of the Act.[232] The trial court allowed recovery only on claims that

220. *Id.*

221. *Id.* at 1206-07. The court pointed out that Seagram had guaranteed a gross margin on certain products, not a net margin. *See id.* at 1206. Thus, Midwest was not coerced into offering discounted prices by the lure of a net margin exceeding that which Seagram would have guaranteed. *See id.*

222. *Id.* at 1207.

223. *Id. Accord* Lewis Serv. Center, Inc. v. Mack Trucks, Inc., 714 F.2d 842, 846-47 (8th Cir. 1983). *See also* Butera v. Sun Oil Co., 496 F.2d 434 (1st Cir. 1974).

224. 310 U.S. 150 (1940).

225. *Id.* at 223.

226. 705 F.2d at 1207.

227. *See id.*

228. *Id.* at 1208.

229. *Id.*

230. *Id.* The court observed that even several of the appellants had sustained increases in sales of Seagram's products during the discount program. *Id.*

231. *Id.*

232. Olsen v. Progressive Music Supply, Inc., 703 F.2d 432, 435 (10th Cir.), *cert. denied*, 104 S. Ct. 197 (1983).

a competing music store (Progressive) had conspired to restrain trade[233] and engaged in a boycott to deprive plaintiff of CBS brand instruments.[234] The opinion is primarily devoted to an analysis of the propriety of the trial court's factual conclusions, which the Tenth Circuit concluded were tenable.[235] The remainder of this section is therefore limited to a survey of the general antitrust principles set forth in the opinion.

### A. *Attempted Monopolization*

In denying plaintiff's section 2 claims, the Tenth Circuit set forth the elements necessary to establish both an attempt to monopolize and a conspiracy to monopolize. To establish an attempt to monopolize, a plaintiff must demonstrate a dangerous probability that the defendant will successfully achieve the power to control prices or exclude competition,[236] prove acts in furtherance of the attempt,[237] demonstrate specific intent to monopolize,[238] and establish the relevant market within which the attempted monopolization occurred.[239] Olsen's attempt claim failed because his continued successful competition despite the conspiracy precluded a finding of dangerous probability of success,[240] and because he presented no evidence of a relevant market.[241]

### B. *Conspiracy to Monopolize*

The elements of conspiracy to monopolize are the existence of a combination or conspiracy to monopolize,[242] overt acts done in furtherance of the combination or conspiracy,[243] effect upon an appreciable amount of interstate commerce,[244] and specific intent to monopolize.[245] The court also stated that proof of a relevant market is not required to establish a conspir-

233. 703 F.2d at 434. This victory was hollow because the trial court found that Olsen was not injured by the conspiracy and did not award damages. *Id.*

234. *Id.*

235. *See id.* at 435-41 (passim).

236. *Id.* at 436 (citing Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951); American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946); Swift & Co. v. United States, 196 U.S. 375, 396 (1905)).

237. 703 F.2d at 436 (citing Lorain Journal Co. v. United States, 342 U.S. 143, 153 (1951)).

238. 703 F.2d at 436 (citing Times Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953); E. J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 306 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976)). Specific intent may be inferred from the anti-competitive nature of the defendant's acts. *E.g.*, Union Leader Corp. v. Newspapers of New Eng., Inc., 180 F. Supp. 125, 140 (D. Mass.), *modified*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

239. 703 F.2d at 437 & n.1 (listing cases). *See also* E. J. Delaney Corp. v. Bonne Belle, Inc., 525 F.2d 296, 307 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976).

240. 703 F.2d at 437. Another factor indicative of the failure to show a dangerous probability of obtaining monopoly power was the absence of evidence that the defendant had a "controlling position" in the relevant market. *Id.*

241. *Id.*

242. *Id.* at 438 (citing American Tobacco Co. v. United States, 328 U.S. 781, 788 (1946)).

243. 703 F.2d at 438 (citing Cullum Elec. & Mechanical, Inc. v. Mechanical Contractors Ass'n, 436 F. Supp. 418, 425 (D.S.C. 1976), *aff'd*, 569 F.2d 821 (4th Cir. 1978)).

244. 703 F.2d at 438 (citing United States v. Yellow Cab Co., 332 U.S. 218, 225 (1947); Times Picayune Publishing Co. v. United States, 345 U.S. 594, 611 (1953)).

245. 703 F.2d at 438 (citing American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946)).

acy to monopolize.[246] Because Olsen did not show that the alleged conspiracy had the requisite effect on interstate commerce, or that the defendant had specific intent to monopolize, there was no conspiracy violating section 2.[247]

### C. *Group Boycott: Rejection of the Literal Approach*

The trial court found that Progressive conspired with CBS in order to prevent the plaintiff from receiving CBS products.[248] This boycott was incident to Progressive's plan to maintain its high mark-up on CBS products by preventing low cost sales by the plaintiff.[249] Progressive argued that plaintiff was excluded from the market for CBS products as a necessary incident of a legitimate joint marketing effort between Progressive and CBS.[250] Thus, even if the defendants had literally engaged in a "group boycott," their boycott was not of the type condemned as a per se violation of the Sherman Act.[251]

Although the Tenth Circuit accepted defendant's premise that not all activities literally characterizable as "boycotts" were per se violations,[252] it disagreed with the defendant's conclusions about the boycott of Olsen. The trial court determined that the motivations behind the boycott were either to protect high profit margins or harm Olsen.[253] Given those findings, and the absence of evidence of any procompetitive impacts flowing from the boycott, the Tenth Circuit affirmed the trial court's conclusion that Progressive had engaged in a per se violation.[254]

### D. *Price-Fixing Damages and Duplication of Damages*

The final issue antitrust issue was the trial court's refusal to award damages for Progressive's price fixing behavior.[255] The trial court originally refused to award damages because it found that plaintiff's ability to sell below the fixed prices precluded a finding of damages.[256] The Tenth Circuit disagreed with this conclusion,[257] but held that damages could not be awarded under the price-fixing claim because such damages would merely duplicate the award under the boycott claim.[258]

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246. 703 F.2d at 438 (citing Salco Corp. v. General Motors Corp., 517 F.2d 567 (10th Cir. 1975)).

247. 703 F.2d at 438.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* E. A. McQuade Tours, Inc. v. Consol. Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973) provides a thorough summary of the Supreme Court decisions analyzing the anticompetitive risks found in those business arrangements constituting a per se violation as a "group boycott." *See* 467 F.2d at 185-87.

252. 703 F.2d at 438-39.

253. *Id.* at 439.

254. *Id.*

255. *See id.* at 440.

256. *Id.*

257. *Id.*

258. *Id.*

## IV. APPLICATION OF THE SHERMAN ACT TO INTRASTATE ACTIVITY

In *Lease Lights, Inc. v. Public Service Co*.[259] the Tenth Circuit reversed the trial court's conclusion that the commercial effects of plaintiff's business were too localized to permit invocation of Sherman Act protections.[260] Plaintiff was engaged in providing commercial outdoor lighting services, and alleged that Public Service Company of Oklahoma monopolized and attempted to monopolize a local market for commercial outdoor lighting services.[261] The trial court concluded that the outdoor lighting business engaged in by both plaintiff and defendent was essentially the "rental of illumination," which was a purely intrastate business.[262] The trial court also concluded that although plaintiff's customers were involved in interstate commerce and that although plaintiff's lighting services were supplied with materials purchased in interstate commerce, plaintiff had failed to introduce evidence that defendant's challenged activities had adversely affected either the interstate business of plaintiff's customers or the interstate flow of the materials used by plaintiff.[263] Hence, because the Sherman Act could only be invoked when the threatened business activity was itself "in interstate commerce," or when the challenged activities adversely affected a meaningful amount of interstate commerce,[264] plaintiff had not stated a claim cognizable under the Sherman Act.[265]

Reversing the trial court's dismissal for lack of jurisdiction, the Tenth Circuit held that the trial court had improperly required proof of an *adverse* effect on interstate commerce.[266] The court emphasized that the Supreme Court has consistently held that the Sherman Act's jurisdictional requirements are satisfied when a defendant's activities merely have a *substantial* effect on interstate commerce.[267] Because the lighting business involved annual interstate purchases of hundreds of thousands of dollars worth of lighting components,[268] the defendant's activities involved a substantial effect on interstate commerce.[269] Accordingly, the Sherman Act afforded protection to plaintiff's business.[270]

*Lease Lights* also rejected two other jurisdictional deficiencies asserted by the defendant. First, plaintiff's uncontroverted evidence showed that the nexus between interstate commerce and defendant's activities was concrete,[271] vitiating defendant's contention that plaintiff had alleged only a

259. 701 F.2d 794 (10th Cir. 1983).
260. *Id.* at 798.
261. *Id.* at 796.
262. *Id.*
263. *Id.* at 797.
264. *Id.*
265. *Id.*
266. *Id.* at 798-99 (quoting from McClain v. Real Estate Bd., 444 U.S. 232 (1980); Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)).
267. 701 F.2d at 796.
268. *Id.* at 799.
269. *Id.*
270. Uncontroverted evidence showed that the majority of outdoor lighting installations were made with products purchased in interstate commerce. *Id.* at 799-800.
271. *Id.*

speculative connection between defendant's activities and interstate commerce.[272] Second, the fact that plaintiff's injuries may have been self-inflicted[273] did not eliminate the public injury inhering in monopolistic activities.[274] Hence, the Sherman Act requirement of public injury[275] was present.[276]

## V. INTRACORPORATE CONSPIRACY AND LICENSED AGENTS

The Tenth Circuit upheld a summary judgment for the defendants in *Holter v. Moore & Co.*,[277] finding that Colorado's statutory regulation of the real estate brokerage business precluded the conclusion that real estate sales personnel were economically distinguishable from their employing broker.[278] Accordingly, the plurality of economic actors necessary to support a section 1 claim was lacking, and summary judgment was proper.[279]

*Holter* involved a claim that the standard seven percent commission Moore and Company paid its real estate agents constituted both resale price maintenance by Moore and its agents and horizontal price fixing by the sales agents.[280] The trial court held that Moore and its agents constituted a single indivisible economic entity, and that Moore and its agents were therefore incapable of conspiring among themselves.[281] The Tenth Circuit began its review by noting that because corporations can only act through their employees, as a general rule a corporation's employees cannot conspire with the corporation or with each other when corporate matters are involved.[282] Further, legal labels characterizing the nature of an employment relationship in non-antitrust contexts are not determinative in antitrust analysis; the actors must be "separate economic entities in substance."[283] Because the question of a party's separate economic status is a question of fact,[284] the Tenth Circuit's inquiry was limited to whether the record created an issue of economic separateness for jury consideration.[285]

The Tenth Circuit's first step in the analysis was an examination of state laws requiring the defendants to conduct their business in a specified manner.[286] Although characterizing an agent's status as independent ultimately remained a question of federal law,[287] "state laws limiting the scope

272. *See generally* Crane v. Intermountain Health Care, Inc., 637 F.2d 715 (10th Cir. 1980) (en banc).

273. Defendant asserted that plaintiff's business reversal was due to internal mismanagement. 701 F.2d at 800.

274. *Id.* (quoting Mishler v. St. Anthony's Hosp. Sys., 694 F.2d 1225, 1228 (10th Cir. 1981)).

275. *E.g.*, Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210 (1959).

276. 701 F.2d at 800.

277. 701 F.2d 854 (10th Cir.), *cert. denied*, 104 S. Ct. 347 (1983).

278. *Id.* at 856-57.

279. *Id.* at 857.

280. *Id.* at 855.

281. *Id.*

282. *Id.*

283. *Id.* (citing Blankenship v. Herzfeld, 661 F.2d 840, 846 (10th Cir. 1981)).

284. 702 F.2d at 855.

285. *Id.* at 856.

286. *Id.* at 856 & n.5.

287. *Id.* at 856.

of a person's professional actions may effectively place that person under an employer's supervision and control, in which event the employer will be the only independent economic actor."[288]

Relevant Colorado statutory law provided that every real estate agent must be licensed;[289] that a precondition to being licensed is securing an agreement to work for a broker;[290] that an agent is issued only one license[291] which must be kept in the custody of his broker,[292] thereby precluding the agent from simultaneously working for more than one broker. Additionally, real estate services must be performed only in the broker's name;[293] compensation for the agent's services must be paid directly to the broker;[294] and a broker may not relinquish his authority to supervise his agents.[295] Moreover, a broker's failure to reasonably supervise its agents may result in the revocation of a broker's license.[296] Weighing these statutory controls over an agent's freedom against the proffered indicia of independence,[297] the court found that Colorado's real estate laws created an employer-employee relationship between brokers and agents.[298] Accordingly, the defendants were legally incapable of conspiring with each other.[299]

## VI. MEANING OF "GAME SITE" IN TELEVISED FOOTBALL EXEMPTION

The National Football League enjoys a statutory exemption from the antitrust laws for its broadcast of football contests as long as the broadcasts do not interfere with local college and high school games played during specified time periods.[300] To invoke this limitation on the antitrust exemption, by August 1 of each year schools are required to give notice of the "game sites" for local contests.[301] *Colorado High School Activities Association v. National Football League*,[302] a case of first impression, required construction of the phrase "game site" as used in the limitation to the antitrust exemption.[303]

In 1977, 1978, and 1979, National Football League games were telecast into the Denver market at the same time that the state high school football championship contests were being played.[304] The Colorado High School Activities Association conceded that it had not given notice of the exact geo-

288. *Id.*
289. COLO. REV. STAT. § 12-61-102 (Supp. 1983).
290. *Id.* § 12-61-103(5).
291. *Id.* § 12-61-109(4).
292. *Id.* § 12-61-104(1) (1978).
293. 4 COLO. ADMIN. CODE 725-1E-9 (1983).
294. COLO. REV. STAT. § 12-61-117 (1978).
295. 4 COLO. ADMIN. CODE § 725-1E-9 (1983).
296. COLO. REV. STAT. § 12-61-113(1)(o) (1978).
297. Real estate agents set their own hours, paid their own taxes, and only received commission income. 702 F.2d at 856.
298. *Id.* at 857. *Accord* Faith Realty & Dev. Co. v. Indus. Comm., 170 Colo. 215, 220, 460 P.2d 228, 230 (1969).
299. 702 F.2d at 857.
300. *See* 15 U.S.C. §§ 1291, 1293 (1982).
301. *See id.* § 1293.
302. 711 F.2d 943 (10th Cir. 1983).
303. *Id.* at 945.
304. *Id.* at 944.

graphic location of the championship game sites.[305] The association noted that its practice of playing the championship game at a site determined following an elimination tournament precluded such notice,[306] and that designation of championship game sites as "Denver" or "the Denver metropolitan area" was the best possible notice which could be provided.[307] The association then argued that, given the statutory purpose of protecting high school game receipts, its geographic designations constituted compliance with the statute.[308]

Both the Tenth Circuit and the district court disagreed with the association.[309] The Tenth Circuit resolved the dispute by concluding that the legislative history evinced no intent to give the phrase "game site" other than its plain, ordinary meaning.[310] That ordinary meaning was determined to be the "particular football field or stadium where the game is to be played."[311] Because the association had not provided the NFL with the statutory game sites, the NFL's challenged broadcasts did not violate the terms of the antitrust exemption.[312]

## VII. STATUTE OF LIMITATIONS ANALYSIS FOR BUSINESS FAILURE AND PURCHASE OF PRODUCTION FACILITIES

*Curtis v. Campbell-Taggart, Inc.*[313] affirmed a summary judgment ruling against a plaintiff who had alleged the existence of anticompetitive conspiracies in portions of Oklahoma's baking business.[314] In affirming the summary judgment, the Tenth Circuit set forth the ingredients necessary to recover on a Sherman Act claim alleging that a competitor's purchase of production facilities was anticompetitive.[315] Additionally, *Campbell-Taggart* addressed the application of the Sherman Act's four-year statute of limitations[316] to a claim involving destruction of the plaintiff's business.[317]

Curtis, the plaintiff in *Campbell-Taggart*, had been a professional baker since 1947.[318] His dispute with the defendants arose out of two bakery closings. The first involved the closing of Curtis' own bakery in 1969, allegedly as the result of the defendants' conspiratorial activities.[319] The second closing involved a bakery owned by Curtis' employer, and gave rise to two antitrust claims. The first claim was that the defendants' conspiracy had forced the closing of Curtis' employer's bakery in 1977; the second claim alleged that defendants had conspired to prevent Curtis' purchase of the closed facil-

305. *Id.* at 945.
306. *Id.*
307. *Id.*
308. *Id.*
309. *See id.* at 945.
310. *Id.* at 945-46.
311. *Id.* at 945.
312. *Id.* at 946.
313. 687 F.2d 336 (10th Cir.), *cert. denied*, 103 S. Ct. 576 (1982).
314. *Id.* at 337.
315. *See id.* at 338.
316. *See* 15 U.S.C. § 15b (1982).
317. *See* 687 F.2d at 337.
318. *Id.*
319. *Id.*

ity, which defendants eventually purchased for themselves.[320]

Plaintiff's claim relating to the forced closure of his bakery was brought more than four years after the bakery closed.[321] Defendants therefore sought summary judgment based upon the four-year statute of limitations applicable to private Sherman Act claims.[322] Plaintiff argued that the forced closure of his plant resulted in a continuing violation, and that the claim was therefore timely.[323] The Tenth Circuit disagreed. Because the applicable statute of limitations runs from the date a defendant's acts cause injury to a plaintiff,[324] the relevant statute of limitations inquiry when seeking to bar a claim entirely is the *last* date a defendant's acts cause injury to the plaintiff. The Tenth Circuit held that when a claim is based on the destruction of a plaintiff's business, the last day of business is the final date upon which a defendant's acts cause injury to the plaintiff.[325] Hence, plaintiff's first claim was barred by the statute of limitations.[326]

The court also summarily dismissed Curtis' claim that he was entitled to recover for the closing of his employer's plant. Because Curtis was a salaried employee at the time of the plant closing, he lacked standing to seek redress for anticompetitive practices harming his employer.[327]

Finally, the Tenth Circuit upheld dismissal of Curtis' claim relating to the alleged conspiracy to prevent his purchase of his employer's closed plant.[328] The court recognized that Curtis could potentially have standing to assert this claim,[329] but held that Curtis had not, as a matter of law, satisfied the requirements for such "excluded entrant" standing.[330] The two elements necessary for "excluded entrant" standing are a manifested intent to enter a particular business, and a demonstrable preparedness to effect that entry.[331] No specific indicia of the necessary intent were set forth in *Campbell-Taggart*, but the court did set forth the following indicia of preparedness: current financial ability to enter and operate the proposed business; existing contractual obligations concerning purchase of the business; other affirmative acts taken towards entry; and the proposed entrant's background and experience.[332] Although Curtis' evidence showed an intention to enter and showed extensive bakery experience, his inability to demonstrate a present financial ability to purchase the plant precluded a finding that Curtis was

320. *Id.*

321. *Id.*

322. *Id. See* 15 U.S.C. § 15b (1982).

323. 687 F.2d at 337.

324. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971).

325. 687 F.2d at 337 (citing Poster Exch., Inc. v. National Screen Serv. Corp., 517 F.2d 117, 126 (5th Cir. 1975), *cert. denied sub nom.* Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp., 423 U.S. 1054 (1976)).

326. 687 F.2d at 337.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.* (quoting Hecht v. Pro-Football, Inc., 570 F.2d 982, 987 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978)).

332. 687 F.2d at 338 (citing Martin v. Phillips Petroleum Co., 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966)).

prepared to enter the business.[333] Accordingly, Curtis lacked standing to bring a federal antitrust action based on the defendants' activities surrounding the final disposition of the closed plant.[334]

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333. *See* 687 F.2d at 338.
334. *Id.*

# CIVIL RIGHTS

## OVERVIEW

During this survey term the Tenth Circuit Court of Appeals again considered a large number of appeals arising from actions brought under federal civil rights statutes. One area of controversy treated by this survey was created when two Tenth Circuit panels, hearing cases brought under Title VII of the Civil Rights Act of 1964,[1] adopted inconsistent approaches towards evaluating the evidentiary effect of proof that a minority candidate has better objective qualifications than a selected applicant. Another employment discrimination opinion covered by this survey examined the use of statistical evidence to establish a pattern of discrimination.

The majority of civil rights appeals analyzed here, however, relate to actions brought under 42 U.S.C. § 1983.[2] Section 1983 provides a civil remedy for persons suffering deprivations of federally protected rights through actions taken under color of state law.[3] Several Tenth Circuit opinions analyzed in this section involve the question of when an ostensibly private party's joint participation with a state or municipal entity constitutes action taken under color of state law. Other section 1983 issues surveyed include immunity for municipal officials, prisoner's rights, the propriety of awarding a section 1983 plaintiff nominal damages, "special circumstances" which will preclude an award of attorney fees to a prevailing plaintiff in a section 1983 action, and due process claims.

## I. EFFECT OF PROVING A MINORITY CANDIDATE'S OBJECTIVELY SUPERIOR QUALIFICATIONS IN A TITLE VII ACTION

### A. Mohammed v. Callaway: *Rebuttal of an Employer's Subjective Justifications through Proof of Objectively Superior Qualifications*

In *Mohammed v. Callaway*[4] the plaintiff, a Hispanic civilian employee of the Army, applied for a supervisor's position in response to a posted job vacancy.[5] The announcement listed specific job qualifications, which the plaintiff possessed.[6] The stipulated facts established that the job opening

1. 42 U.S.C. §§ 2000e-2000e(17)(1976 & Supp. V 1981).
2. 42 U.S.C. § 1983 (Supp. V 1981). This section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

*Id.*

3. *See id.*
4. 698 F.2d 395 (10th Cir. 1983).
5. *Id.* at 396.
6. *Id.*

was withdrawn, and less than a year later the Army posted a similar opening[7] with relaxed job qualifications.[8] Dyer, the non-minority applicant hired for the job, did not possess the original job qualifications,[9] nor did he possess the technical qualifications required for the revised position.[10] Nevertheless, Dyer was hired over Mohammed and two other applicants because of Dyer's "experience, education, ability, dedication, and enthusiasm."[11] After Mohammed brought an administrative complaint alleging procedural irregularities in the selection process, the Army ordered a new selection based on an ostensibly objective "Ranking Guide."[12] When Dyer was selected again, Mohammed brought suit against the Army alleging discrimination under Title VII.[13] Following a bench trial, the district court held that Mohammed was not entitled to relief on two grounds. First, he had failed to establish a prima facie case of discrimination.[14] Second, even if a prima facie case had been established, the evidence showed that the Army had chosen between two "amply" qualified candidates on the basis of legitimate business reasons.[15]

1. Elements of a Prima Facie Claim of Promotion Discrimination

The trial court formulated the elements of a prima facie case of promotion discrimination as "1) qualified applicant; 2) racial minority; 3) unsuccessful application for existing vacancy; and 4) employer continuing to seek further applicants."[16] This formulation precisely paralleled that of the Supreme Court in *McDonnell Douglas Corp. v. Green*.[17] The Tenth Circuit rejected the trial court's formulation, pointing out that in promotion discrimination, as opposed to hiring discrimination, the sought after position will usually be filled following rejection of the minority's application.[18] Noting that the Court in *McDonnell Douglas* had explicitly recognized that the elements of a prima facie case of employment discrimination will vary with the

7. The evidence indicated that the two positions were identical, although this question was the subject of conflicting testimony. *See id.* at 396-97 & n.1.

8. Originally, the position in dispute was at a grade level GS-13; the position was downgraded to GS-12 the second time it was posted. Mohammed and two other finalists could have qualified at the GS-13 level, while the applicant selected for the position could not have qualified at that level. *Id.* at 397.

9. *Id.*

10. *Id.* at 400.

11. *Id.* at 397.

12. *Id.* at 398.

13. Title VII of the 1969 Civil Rights Act, 42 U.S.C. §§ 2000e-2000e(17)(1976 & Supp. V 1981). *See* 698 F.2d at 398.

14. 698 F.2d at 398.

15. *Id.* at 399.

16. *Id.* at 398.

17. 411 U.S. 792, 802 (1973). *McDonnell Douglas* held that a prima facie case of discrimination in hiring is established when a plaintiff's evidence shows that he or she belongs to a protected class; that he or she, while qualified for an open position, applied for that position; that he or she was rejected for the position in spite of being qualified; and that the employer continued to seek qualified applicants following rejection of the plaintiff. *Id.* "Protected classes" embrace classes based on race, color, religion, sex, or national origin. *See* 42 U.S.C. 2000e-2(a)(2)(1976).

18. *See* 698 F.2d at 398.

nature of the alleged discriminatory act,[19] the Tenth Circuit held that a plaintiff establishes a prima facie case of promotion discrimination by proving that the first three *McDonnell Douglas* criteria are present[20] and then showing that the position has been filled by another applicant.[21] Because Mohammed's evidence satisfied this test, the Tenth Circuit held that a prima facie case of employment discrimination was established as a matter of law.[22]

2. Subjective Hiring Criteria as Proof of Discriminatory Intent in Light of a Minority Candidate's Objectively Superior Qualifications

Once a prima facie case of discrimination is shown, the burden of production[23] shifts to the defendant employer to articulate a legitimate business reason for its prima facie discriminatory practice.[24] The employer meets this burden by articulating a nondiscriminatory justification for its hiring decision.[25] The plaintiff then has an opportunity to prove, by a preponderance of the evidence, that the employer's alleged reasons for rejecting the application were only a pretext for unlawful discrimination.[26] The employee can satisfy this burden by showing that a discriminatory intent in fact motivated the employer's decision, or by offering evidence showing that the proffered justification is unbelievable.[27]

The district court in *Mohammed* found that the evidence showed that Mohammed and Dyer were both "amply" qualified.[28] In that context, subjective considerations were accepted as a legitimate business reason supporting the Army's selection of Dyer.[29] The district court then concluded that Mohammed had not shown that the proffered reasons were mere pretext,[30] and accordingly held that the Army had not intentionally discriminated in violation of Title VII.[31]

After reviewing the entire record, the Tenth Circuit held that the district court's findings of fact were clearly erroneous,[32] and that the district court had applied an erroneous legal standard in evaluating the employer's explanations.[33] The record showed that the candidate selected was not "am-

19. *Id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)).
20. *See supra* note 17.
21. 698 F.2d at 398 (quoting Mortenson v. Callaway, 672 F.2d 822, 823 (10th Cir. 1982)).
22. 698 F.2d at 398.
23. The employee retains the burden of persuasion throughout a Title VII action. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
24. *McDonnell Douglas*, 411 U.S. at 802. The prima facie case entitles an employee to judgment if the employer fails to come forward with a legitimate business reason. *Burdine*, 450 U.S. at 254.
25. *Burdine*, 450 U.S. at 255.
26. *Id.* at 256.
27. *Id.*
28. 698 F.2d at 399.
29. *See id.* at 400-01.
30. *Id.* at 399.
31. *See id.* at 396.
32. *See id.* at 401.
33. *See id.*

ply" qualified.[34] More importantly, the record showed that the candidates were not *equally* qualified:[35] specific qualifications placed in the job announcement were met by Mohammed, but not by Dyer.[36] The Tenth Circuit concluded that a candidate meeting the specific requirements in a job announcement is objectively more qualified than one who does not meet the stated requirements.[37] Although an employer retains discretion to choose between *equally* qualified candidates on the basis of nondiscriminatory, subjective criteria,[38] the use of those criteria when candidates are not equally qualified substantially diminishes the credibility of the employer's justification for using subjective criteria as the ultimate basis of its decision.[39] Given the inferences of discriminatory intent arising from the totality of the Army's conduct,[40] the Tenth Circuit found that the Army had engaged in intentional discrimination and accordingly reversed the lower court.

### 3. Summary

Three significant principles for proving employment discrimination result from *Mohammed*. First, the elements of a prima facie case of employment discrimination are flexible.[41] Second, a critical determination in assessing whether applicants are equally qualified is the match between an applicant's credentials and posted job requirements.[42] Third, a strong inference of intentional discrimination arises when an employer uses subjective factors to justify the rejection of a minority candidate who is objectively better qualified than the candidate chosen.[43]

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981) (quoted in *Mohammed*, 698 F.2d at 401).

39. *See* 698 F.2d at 401. Adams v. Gaudet, 515 F. Supp. 1086 (W.D.La. 1981) held that unless a selected applicant is objectively more qualified than a rejected minority applicant, the employer does not rebut the prima facie case by explaining that its hiring decision was based on an employer's prerogative to make a discretionary selection. *Id.* at 1097-98 (citing *Burdine*, 450 U.S. at 259). *Mohammed* cites *Gaudet* for the proposition that use of subjective criteria in rejecting a better qualified minority candidate is indicative of discriminatory intent. 698 F.2d at 399. *Mohammed*, however, did not adopt *Gaudet's* categorical rejection of the power of a discretion-based explanation to rebut a prima facie case when an objectively better qualified minority applicant has been rejected. *See id.* at 401.

40. The court observed that, in addition to reliance on subjective considerations, the Army had engaged in inexplicable procedural irregularities in filling the position in question, had adopted but not implemented an affirmative action program, and had never permitted a minority to hold a supervisory position in the division encompassing the disputed position. 698 F.2d at 401.

41. *See supra* notes 18-21 and accompanying text.

42. *See supra* text accompanying notes 35-38.

43. *See supra* note 40 and accompanying text. *See also* Bauer v. Bailar, 647 F.2d 1037, 1045 (10th Cir. 1981)(subjective decision-making creates inference of discriminatory intent where applicant's protected class is significantly under-represented). In another twist on the use of subjective qualifications, the Tenth Circuit recently held that failure to meet an employer's subjective criteria could not defeat a plaintiff's prima facie case. Burrus v. United Telephone Co., 683 F.2d 339, 342 (10th Cir.), *cert. denied*, 103 S.Ct. 491 (1982).

### B. Verniero v. Air Force Academy School District #20: *The Insignificance of Superior Objective Qualifications*

Three months after *Mohammed*, a different Tenth Circuit panel addressed another case involving a similar set of facts, but reached its result by using an analysis inconsistent with that of *Mohammed*. In *Verniero v. Air Force Academy School District #20*,[44] the plaintiff, a female, applied for two job vacancies within School District #20: elementary school principal and director of special education.[45] The school district had posted a vacancy notice for the elementary school principal position listing three job requirements: 1) three years experience in public schools, 2) master's degree or equivalent, and 3) a Type D administrative certificate.[46] Although the plaintiff undisputably met all three requirements, a male applicant who possessed only two of the qualifications[47] was selected over Verniero, allegedly on the basis of certain subjective factors.[48] The job announcement for the position of Director of Special Education listed three years experience in special education and a Type D or special education endorsement as the required qualifications.[49] Although the plaintiff was admittedly qualified, a male applicant was hired.[50] Verniero then brought suit alleging sex discrimination under Title VII.

Following a bench trial, the district court found that the plaintiff had established a prima facie case of discrimination, that the defendant had articulated a legitimate non-discriminatory reason for plaintiff's non-selection; and that plaintiff had been unable to show the proffered reasons were pretext, or were overshadowed by unarticulated discriminatory purposes.[51] Thus, plaintiff failed to carry her ultimate burden of proving that she was the victim of intentional sex discrimination.[52]

Verniero appealed to the Tenth Circuit on three grounds. First, she argued that the district court failed to give due weight to the fact that she had established a prima facie case of discrimination.[53] Second, she argued that the court failed to evaluate the school board's use of subjective criteria in its selection process as a possible pretext for sex discrimination.[54] Finally, Verniero argued that the trial court failed to recognize that waiver of the Type D certificate after it had been listed as a job qualification indicated

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44. 705 F.2d 388 (10th Cir. 1983).

45. *Id.* at 390.

46. *Id.*

47. The male applicant, who came from outside the state, did not possess the required Type D Administrative Certificate. *Id.* at 390.

48. *Id.* at 392. The School District presented evidence that it preferred an out-of-state person, and that certification requirements had been waived for other out-of-state persons "in certain circumstances." *Id.*

49. *Id.* at 390.

50. *Id.*

51. *Id.*; *cf. Burdine*, 450 U.S. at 256 (plaintiff may demonstrate employer's justification was not basis for selection decision by showing that "a discriminatory reason more likely motivated the employer or . . . by showing that the employer's proffered explanation is unworthy of credence").

52. 705 F.2d at 392.

53. *Id.* at 391.

54. *Id.*

that the district's reasons for failing to hire her were pretextual.[55]

Judge Barrett, writing for the Tenth Circuit over Judge McKay's dissent, found the plaintiff's first argument to be without merit.[56] Judge Barrett stated that when the trial court properly found that the plaintiff had established a prima facie case, it correctly shifted the burden to the defendant to articulate a legitimate nondiscriminatory reason for denying the position to the plaintiff.[57] Because this was the proper treatment of a prima facie case, plaintiff's first ground for appeal did not justify reversal.

The plaintiff's next contention was essentially that the pervasive subjectivity of the articulated basis for the Board's decision precluded a finding that the Board had not consciously or unconsciously discriminated in the hiring process.[58] While acknowledging that a decision based on subjective opinions of a candidate's qualifications entitles a plaintiff "to the benefit of an inference of discrimination,"[59] the Tenth Circuit affirmed the district court's holding that the subjective factors used by the district, such as the quality of an employee's work experience or the employee's ability to get along with others, were legitimate reasons for selecting one applicant over another.[60] Because the defendant had articulated legitimate reasons for the plaintiff's non-selection, plaintiff was required to show that the ostensibly legitimate reasons merely shrouded the employer's true discriminatory motive.[61] Deferring to the trial court's findings, the Tenth Circuit held that the plaintiff had not shown that the school district's justifications were merely pretextual.[62]

Plaintiff's third argument, that the defendant's waiver of the Type D certificate after listing it as a job qualification demonstrated that the Board's justifications for its hiring decision were merely pretextual, was also rejected.[63] Testimony indicated that the certificate requirements had been waived for non-residents in certain circumstances in the past, and that the Board preferred a non-resident for the position.[64] Once again, the court refused to reverse the trial court's finding that the defendant had acted for its stated, legitimate reasons and without discriminatory intent.[65]

Finally, the court rejected plaintiff's contention that remarks of the trial judge demonstrating distaste for discrimination suits justified a new trial. Although the majority found the remarks "misplaced," it viewed them as

55. *Id.* at 391.

56. *Id.*

57. *Id.* The purpose of the prima facie case is to ensure that the employment decision did not result from a simple lack of qualifications or lack of a job opening. International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977). The prima facie case essentially serves to identify a case as one having an inherent likelihood of discrimination, thus requiring the presentation of substantive evidence of non-discrimination. *See Burdine*, 450 U.S. at 253-56.

58. *See* 705 F.2d at 391.

59. *Id.* (citing Burrus v. United Telephone Co., 638 F.2d 339, 342 (10th Cir. 1982)).

60. 705 F.2d at 392.

61. *Id. See also Burdine*, 450 U.S. at 256.

62. 705 F.2d at 391.

63. *Id.* at 392.

64. *Id.*

65. *Id.*

harmless.[66]

In a persuasive dissent, Judge McKay stressed that the majority erred by failing to engage in the method of analysis set forth in *Mohammed*.[67] In *Mohammed* the Tenth Circuit emphasized that when an employer rejects a minority candidate on the basis of employer discretion (i.e. on the basis of subjective factors), the crucial determination is whether the candidate selected is as objectively qualified as the minority candidate.[68] Incident to this inquiry, *Mohammed* held that candidates meeting the specific requirements in a job announcement are objectively better qualified than those who do not,[69] and that once the bypassed minority employee establishes superior objective qualifications the factfinder must consider the inference of discriminatory intent which results from the decision to use subjective, rather than objective, criteria.[70] Similarly, *Mohammed* confirmed that employer use of subjective factors to justify rejection of a minority candidate generally supports an inference of discriminatory intent or pretext.[71] Judge McKay would have remanded because the *Verniero* trial court failed to consider the relative objective qualifications of plaintiff and the successful candidate, and because the trial court's findings failed to give due weight to the strong inference of discriminatory intent arising from the employer's ultimate reliance on subjective hiring criteria.[72]

Judge McKay also dissented from the majority's treatment of the trial judge's disparaging remarks. Noting that judges must disqualify themselves if their impartiality towards a particular case could be reasonably questioned,[73] Judge McKay felt that the trial judge's remarks clearly demonstrated a prejudicial lack of impartiality which, in conjunction with the failure to follow *Mohammed*, mandated a new trial.[74]

### C. *The Conflict Created by* Mohammed *and* Verniero

One possible explanation for the difference in the appellate treatment of *Mohammed* and *Verniero* is the different nature of the disputed positions. The supervisory position in *Mohammed* was technically oriented, rendering subjective factors of little relevance in the hiring decision. Given the technical orientation of the position, the applicant meeting the posted requirements is clearly the better qualified candidate. Conversely, in school staff administrative positions, like those in *Vernerio*, subjective factors, such as the ability to

66. *Id.* at 393. Prior to entering his findings of fact and conclusions of law, the trial judge questioned the reasons why anyone would serve as a school board member in light of the liability for civil rights violations, and stated that the only way a board member could be absolutely sure of avoiding discrimination cases is by hiring "only handicapped females having as grandparents a Black, a Chicano, an American Indian and an Oriental, who is over 50 years of age." *Id.* at 393 n.2.

67. *Id.* at 393 (McKay, J., dissenting).

68. *Id.* *See supra* notes 35-39 and accompanying text.

69. *See supra* notes 35-36 and accompanying text.

70. *See supra* notes 38-39 and accompanying text.

71. *See supra* note 40. *See also Mohammed*, 698 F.2d at 401.

72. 705 F.2d at 394 (McKay, J., dissenting).

73. *Id.* at 394 (quoting 28 U.S.C. § 455(a)(1982)).

74. 705 F.2d at 395 (McKay, J., dissenting).

work with others, would be of greater importance. The *Vernerio* court did not, however, attempt to articulate such a distinction. As a result, trial courts lack guidance on whether, and to what extent, *Mohammed*'s objective-criteria based analysis is controlling.[75]

## II. THE USE OF STATISTICS IN EMPLOYMENT DISCRIMINATION CASES

During the survey term, the Tenth Circuit examined the admissibility of statistical evidence to rebut an employer's reason for rejecting a minority applicant. In *Anderson v. City of Albuquerque*[76] the plaintiff, while employed by the City of Albuquerque, learned that the staff director for the Human Rights Board was planning to resign and applied for the position.[77] Anderson then voluntarily left her job with the city to accept a position elsewhere, but did not withdraw her application for the staff director position.[78] Upon learning that a male Hispanic was appointed to the position, Anderson instituted a class action under Title VII claiming illegal sex discrimination.[79] The trial court dismissed the class action, held the staff director's position was exempt from Title VII, and dismissed Anderson's claim on the merits.[80] Anderson then appealed, contending that the court erroneously denied her standing to maintain the class action,[81] erroneously ruled the position was exempt,[82] and erroneously failed to admit and consider statistical evidence she offered to rebut the employer's articulated legitimate business reason for its selection of another candidate.[83] The Tenth Circuit, over Chief Judge Seth's dissent, agreed with all of plaintiff's contentions.[84]

### A. *Class Action Standing for Voluntarily Terminated Employee*

The trial court ruled that the Tenth Circuit's *Hernandez v. Gray*[85] decision precluded finding that plaintiff had standing to maintain a class action representing past, present, and future female city employees.[86] *Hernandez* held that former employees who had voluntarily terminated their employment could not maintain a class action based on allegations of discrimina-

75. Further confusion stems from *Mohammed* itself. The court noted that an Army witness had testified that specific qualifications were listed in job announcements for the express purpose of obtaining the best qualified personnel. 698 F.2d at 400. The court stated that "[t]he only reasonable inference to be drawn from *this evidence* is that a candidate who meets the specific requirements in the job announcement is better qualified than one who must resort to alternative criteria." *Id.* (emphasis supplied). Thus it is unclear whether a candidate meeting posted qualifications will automatically be deemed more objectively qualified, or whether employer testimony concerning the purpose of specific requirements will be necessary in order to establish the superior objective qualifications of one matching posted requirements.

76. 690 F.2d 796 (10th Cir. 1982).

77. *Id.* at 798.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 800.

83. *Id.* at 802.

84. *See id.* at 803.

85. 530 F.2d 858 (10th Cir. 1976).

86. 690 F.2d at 799.

tion towards existing employees.[87] The reason for this holding was that the voluntary ex-employees did not allege they were past victims of the alleged discriminatory practice, nor did they allege they were presently victims of the employer's discrimination.[88] Thus, they were not representatives of the putative class, and had no standing to maintain an action on behalf of the class.[89]

Unlike the trial court, the Tenth Circuit found *Hernandez* distinguishable from *Anderson*.[90] The court noted that Anderson had maintained an employment application despite her voluntary termination; thus, Anderson remained a member of the class subject to the employer's alleged hiring discrimination and had standing to maintain the class action.[91] The court also noted that the district court had erred to the extent it premised its denial of class certification on the merits of plaintiff's claim.[92]

### B. *Title VII Exemption*

Title VII exempts certain governmental advisory/policy making positions from the its antidiscrimination strictures.[93] The Tenth Circuit stated that, in any event, this exemption must be narrowly construed.[94] Examining the evidence detailing the staff director's actual advisory functions, the court concluded that the staff director was not a policy making employee, was not on an elected official's staff, and was not a legal advisor to an elected official.[95] Hence, even though the staff director position was not subject to civil service laws, it did not fall within the claimed exemption.[96]

### C. *Use of Statistical Evidence to Demonstrate Discriminatory Intent*

The Tenth Circuit also reversed and remanded the case to the district court with directions to admit excluded statistical evidence,[97] and then to re-evaluate the evidence and make findings in terms of the three-step presentation of proof analysis set out in *McDonnell Douglas*.[98] The court noted that

87. Hernandez v. Gray, 530 F.2d 858, 859 (10th Cir. 1976).
88. *Id.*
89. *Id.*
90. *Anderson*, 690 F.2d at 799.
91. *Id.*
92. *Id.*
93. *See* 42 U.S.C. § 2000e(f)(1976). This section provides:

> The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

*Id.*
94. 690 F.2d at 800.
95. *Id.* at 800-01.
96. *Id.* at 801.
97. *Id.* at 803.
98. *Id.* The method of proof required by *McDonnell Douglas* is: 1) plaintiff establishes prima facie case; 2) employer articulates legitimate, non-discriminatory reason for its hiring decision; and 3) plaintiff presents evidence showing employer's actual motivation was discriminatory ani-

because upper level jobs are often filled on the basis of subjective factors, statistical evidence of the employer's overall hiring practices becomes especially significant.[99] Although the trial court had admitted statistical evidence relating to the city's general female hiring practices, those statistics did not examine hiring of females as professionals or as department heads.[100] When plaintiff attempted to inquire about those statistics, defense objections were made and sustained.[101] Given the significance of statistics concerning professionals and department heads to plaintiff's claim, and the Supreme Court's explicit approval of the use of statistics to rebut an employer's proffered legitimate reasons for its hiring decision,[102] the Tenth Circuit held that Anderson had been denied a fair trial[103] and ordered a new trial including the excluded statistical evidence.[104] As noted, the majority also instructed the trial court to make its findings of fact in a manner reflecting its consideration of the *McDonnell Douglas* three-step analysis.[105]

D. *The Dissent*

Chief Judge Seth dissented from the majority's ruling on plaintiff's class action claim,[106] its ruling on the exclusion of statistical evidence,[107] and its ruling requiring the trial court to make findings of fact explicitly tracing the *McDonnell Douglas* three-step analysis.[108] The dissent reasoned that the plaintiff had been discriminated against (if at all) only for a nonclassified supervisory position, precluding her from being considered a representative of a class including *all* female city employees.[109] Further, because a class including all future female city employees was "really not a description of a class at all,"[110] the class action claim should have been rejected for failure to identify a true class.[111] Similarly, Chief Judge Seth would have upheld the trial court's rejection of plaintiff's "statistical evidence" concerning professional employment because the lack of any supporting data made the evidence meaningless.[112] Finally, the dissent found no support in Supreme Court rulings or the Federal Rules of Civil Procedure for requiring the trial court to present its findings in a manner exactly paralleling that of the *Mc-*

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mus rather than the proffered legitimate justification. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

99. 690 F.2d at 802 (citing Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982)).

100. 690 F.2d at 802.

101. *Id.*

102. *See McDonnell Douglas*, 411 U.S. at 805.

103. 690 F.2d at 803 (citing Donaldson v. Pillsbury Co., 554 F.2d 825, 833 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977)).

104. 690 F.2d at 803.

105. *Id.*

106. *Id.* at 804 (Seth, C.J., dissenting).

107. *Id.*

108. *Id.* at 805.

109. *Id.* at 804.

110. *Id.*

111. *Id.* at 805.

112. Chief Judge Seth noted that the plaintiff offered no evidence relating the numbers of female professionals or department heads to the labor market, the number of applicants, or "anything else which would make the numbers relevant." *Id.* at 804.

*Donnell Douglas* evidentiary scheme.[113]

## III. SECTION 1983: DUE PROCESS AND THE DEPRIVATION OF PROPERTY

The fourteenth amendment[114] entitles a person to protection of property rights against state interference without due process of law.[115] Persons acting under color of state law who interfere with this fundamental protection without due process of law are subject to a federal civil rights action under section 1983.[116] This section surveys several Tenth Circuit decisions involving property rights and section 1983 claims.

### A. *Requirement of Notice Prior to Sale of Property*

*McKee v. Heggy*[117] began with McKee's arrest for kidnapping.[118] While searching McKee's car the police found what they thought was marijuana and, consequently, seized the car as potential evidence.[119] Two weeks later, after deciding against using the car as evidence, the police treated the car as abandoned and sold it at a public auction without directly notifying the plaintiff.[120] Alleging that the police knew he was an interested party and had failed to notify him of the sale, McKee brought a section 1983 action claiming that he was deprived of a property interest without due process of law when the police sold his car.[121] Deciding the merits of the section 1983 claim, the district court granted summary judgment in favor of the city and the police chief on the basis that the notice provided through police compliance with Oklahoma's abandonment statute[122] satisfied due process.[123]

In light of the fact that the plaintiff's car was seized and not abandoned, the Tenth Circuit held that compliance with the Oklahoma abandonment statute's notice procedures was irrelevant.[124] The court then assessed the adequacy of the notice provided against the standard announced in *Mullane v. Central Hanover Bank and Trust Co.*:[125] notice reasonably calculated to reach

113. *Id.* at 805.

114. U.S. CONST. amend. XIV. The fourteenth amendment prohibits governmental actions which deprive "any person of life, liberty or property without due process of law." *Id.*

115. *Id.* The traditional forms of possessory interests in real and personal property clearly fall within the fourteenth amendment's definition of property. *E.g.*, Fuentes v. Shevin, 407 U.S. 67 (1972). Since the 1972 decision in Board of Regents v. Roth, 408 U.S. 564 (1972), the fourteenth amendment's definition of property has been extended by the concept of "entitlement." This concept includes interests, such as governmental benefits, which are unlike traditional property but which are entitled to fourteenth amendment protection because persons justifiably rely on the continued existence of those benefits. *Id.* at 577. *See generally* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L.J. 405 (1977).

116. Lugar v. Edmondson Oil Co., 457 U.S. 927 & n.18 (1982); Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982); Parratt v. Taylor, 451 U.S. 527 (1981).

117. 703 F.2d 479 (10th Cir. 1983).

118. *Id.* at 480.

119. *Id.*

120. *Id.* at 481.

121. *Id. See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 434(1982).

122. OKLA. STAT. tit. 47, § 908 (1981). This statute provides for notice to an abandoned car's registered owner, *id.* § 908(f), and also requires public notice of a proposed sale. *Id.*

123. 703 F.2d at 481.

124. *Id.* at 482.

125. 339 U.S. 306 (1950).

all interested parties in time to afford them a reasonable opportunity to be heard.[126] The court of appeals found that the posted notice given by the police was not "reasonably calculated" to inform the plaintiff of the sale[127] and thus did not afford him an adequate opportunity to present his objections.[128] Therefore, McKee was deprived of a property interest without being afforded due process of law.[129] The court also noted that because the sale was not explicitly authorized by statute or rule, McKee would have to prove that the sale was pursuant to the department's customary informal procedure in order to establish action under color of state law.[130]

B. *Satisfying Due Process Through Providing A Post-deprivation Tort Remedy*

The Supreme Court, in *Parratt v. Taylor*,[131] held that a prisoner is deprived of property under color of state law when prison personnel negligently lose or destroy a prisoner's property.[132] *Parratt* further held that due process is not violated by deprivation of property simpliciter; rather, there needed to be a shortcoming in the state procedures which resulted in inadequate procedural protection of the prisoner's property interest.[133] Hence, due process is satisfied if circumstances preclude providing a prisoner with meaningful predeprivation process and the state provides a meaningful post-deprivation remedy.[134]

In *Williams v. Morris*[135] the plaintiff brought a section 1983 action alleging that because prison employees had negligently lost his property, which had been stored in the prison during his incarceration, he had been deprived of property without due process.[136] The district court dismissed Williams' suit as frivolous because, although the state could not have predicted the negligent loss of plaintiff's property and therefore could not have provided a meaningful predeprivation hearing, the state had provided a meaningful post-deprivation remedy through a state prison grievance procedure.[137]

The Tenth Circuit affirmed the district court's decision, but differed with the district court's analysis of the source of Williams' meaningful post-deprivation remedy. The court noted that the prison grievance procedure could only afford partial relief, perhaps unconstitutionally, because it did

126. *Id.* at 314. The Supreme Court stated that provision for a hearing satisfies due process only when notice is given which is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id. See* 703 F.2d at 482.

127. 703 F.2d at 482. The Oklahoma City Police Department knew McKee was an interested party because he had informed an interrogating police officer that the car was his, and because his parents and lawyer had repeatedly inquired about the car at the police station. *Id.*

128. *Id.* at 482.

129. *Id.*

130. *Id.* at 482-83.

131. 451 U.S. 527 (1981).

132. *Id.* at 536-37.

133. *See id.* at 537-41.

134. *Id.*

135. 697 F.2d 1349 (10th Cir. 1983).

136. *Id.* at 1350.

137. 697 F.2d at 1351.

not provide a prisoner a chance to prove his entire loss.[138] Turning to state tort law as a source of post-deprivation relief, the court of appeals acknowledged that although the Utah Governmental Immunity Act[139] precluded an action against the state, the warden, or other supervisors, Williams could proceed against those prison employees whose alleged negligence caused his claimed loss.[140] Because the state, via its tort law, provided Williams with a post-deprivation remedy providing the possibility of full compensation for his alleged loss, the Tenth Circuit affirmed the trial court's dismissal of Williams' section 1983 claim.[141]

### C. *Due Process Considerations in Terminating a Public Employee*

In *Miller v. City of Mission,*[142] a newly elected mayor fired the plaintiff, an assistant police chief and member of the police force for over fifteen years, on the grounds that the plaintiff was responsible for the low morale and high turnover in the police department.[143] At the time of his termination plaintiff was informed that he was entitled to a hearing, but was not in fact provided a pretermination hearing.[144] Nine days later, the plaintiff received a letter from the mayor informing plaintiff of his right to a public hearing and listing seven reasons for his termination.[145] Miller was eventually granted a post-termination hearing, at which a list of additional, previously undisclosed reasons for termination were presented.[146] Following the hearing the mayor refused to reinstate Miller who then sought, unsuccessfully, law enforcement employment in several nearby cities as well as local employment unrelated to police work.[147] Miller subsequently brought suit against the city, the mayor, and several city council members under section 1983 claiming that the termination of his employment as assistant police chief had deprived him of liberty and property interests without due process of law.[148]

In a pretrial hearing the district court ruled that the discharge procedure had unconstitutionally deprived Miller of a property interest unless the city could show that the failure to provide a pretermination hearing was based on extraordinary circumstances, existing at the time of termination, which justified denial of a hearing.[149] After trial, the court found that no such circumstances existed.[150]

The district court also determined, on a motion for summary judgment, that the hearing officer presiding over the termination hearing was biased,

138. *Id.* The grievance procedure did not allow a prisoner to recover for items not listed in the prisoner's "property book"; it was the use of this conclusive presumption that was potentially unconstitutional. *Id.* (citing Vlandis v. Kline, 412 U.S. 441 (1973)).
139. *See* UTAH CODE ANN. § 63-30-10 (Supp. 1983).
140. 697 F.2d at 1351.
141. *Id.*
142. 705 F.2d 368 (10th Cir. 1983).
143. *Id.* at 371.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 370.
149. *Id.* at 371.
150. *Id.* at 372.

thereby denying the plaintiff due process.[151] In addition to the violations of due process found by the court, the jury found that the plaintiff had been deprived of a liberty interest without due process of law.[152]

On appeal, the defendants contended that the district court erred in holding that the hearing was defective,[153] that the evidence did not support the conclusion that the plaintiff's liberty interests were denied,[154] and that the city council members were not liable for plaintiff's injuries.[155] The Tenth Circuit rejected these contentions.

1. Pretermination Hearing Requirements

The Tenth Circuit held that the hearing actually accorded petitioner violated due process in three ways. First, due process requires an impartial tribunal and pre-hearing notice of the charges which will be asserted at the hearing.[156] Because the plaintiff first learned of many of the reasons for his dismissal at the hearing itself, due process was violated.[157] Second, absent the presence of an emergency, only a *pre*termination hearing satisfies due process.[158] Because no emergency existed justifying the failure to provide plaintiff a pretermination hearing, due process was violated.[159] Finally, the court rejected the defendants' argument that the Rule of Necessity rendered the hearing adequate, even though the hearing officer may have been prejudiced.[160] Under the Rule of Necessity, due process is not violated when a tribunal has an interest in the matter to be decided if the matter cannot otherwise be heard.[161] The court of appeals found that the defendants' evidence did not demonstrate the unavailability of an unprejudiced hearing officer.[162] Thus, the Rule of Necessity was irrelevant, and due process was violated by use of a biased hearing officer.[163]

2. Deprivation of Public Employee's Liberty Interest

A public employee's liberty interest is deprived without due process of law when the manner of termination either stigmatizes the employee or forecloses comparable employment opportunities.[164] In *Miller*, the irregularity of the termination proceedings[165] failed to provide plaintiff the fair hearing necessary to protect his liberty interests.[166] Further, the mayor responsible

151. *Id.*
152. *Id.* at 372-73.
153. *Id.* at 372.
154. *Id.* at 373.
155. *Id.* at 374.
156. *Id.* at 372 (citing Staton v. Mayes, 552 F.2d 908 (10th Cir.), *cert. denied*, 434 U.S. 907 (1977)).
157. 705 F.2d at 372.
158. *Id.* (citing Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972)).
159. 705 F.2d at 372.
160. *Id.*
161. *Id.* (citing United States v. Will, 449 U.S. 200, 214 (1980)).
162. 705 F.2d at 372.
163. *Id.*
164. *Id.* at 373.
165. *See supra* notes 157-64 and accompanying text.
166. *See* Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

for the termination extensively publicized both the fact of termination and the reasons therefore.[167] Plaintiff's inability to obtain similar employment could reasonably be traced to the defendants' due process violations.[168] The court therefore upheld the jury's conclusion that plaintiff's liberty interests had been violated.[169]

### 3. Immunity for City Council Members

Several defendants also appealed on the grounds that their actions as city council members had not deprived Miller of property without due process, and that they could not be individually liable because of their qualified immunity.[170] The court held that even if these defendant's had not initiated the unconstitutional termination proceedings, they had both ratified the decision to proceed and failed to take steps to prevent unconstitutional action.[171] Accordingly, they were responsible for the injuries caused by the municipality's actions.[172] Further, the city council officials had not acted pursuant to a good faith, reasonable belief that the termination proceedings were constitutional.[173] Hence, they were not entitled to immunity from personal liability.[174]

## IV. STATE ACTION THROUGH NOMINALLY PRIVATE PERSONS

This section examines the extent to which a private entity must interface with the government in order for seemingly private actions to constitute state action for the purpose of section 1983 liability.

### A. *Private School Discipline as State Action*

In *Milonas v. Williams*[175] former students of the Provo Canyon School for Boys brought a class action alleging that their constitutional rights had been violated by the school's use of a behavior-modification program which administered polygraph tests, monitored and censored students' mail, used isolation rooms, and used excessive physical force.[176] The district court found that the school's behavior modification program was carried out "under the cloak of state action."[177] This conclusion was based on the fact that various state agencies charged with supervision over juveniles sent stu-

167. 705 F.2d at 373.
168. *Id.* at 374.
169. *Id.*
170. *Id.*
171. *Id.* at 374-75.
172. *Id.* at 375 (citing McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979)).
173. *Id.* at 375-76. The court noted that the defendants' conduct violated well established principles of constitutional law, and that therefore they could not have had a reasonable belief in the propriety of their actions. *Id.* at 375 n.6. (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)).
174. 705 F.2d at 376. *See generally* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Wood v. Strickland, 420 U.S. 308 (1975)(discussing personal liability of municipal officers).
175. 691 F.2d 931 (10th Cir. 1982), *cert. denied*, 103 S.Ct. 1524 (1983).
176. *Id.* at 934. The school's behavior modification program allegedly involved cruel and unusual punishment and denied plaintiffs' right to due process of law. *Id.*
177. *Id.* at 939.

dents to the school, the fact that the school received significant state funding, and the extensive state regulation of the school.[178] The Tenth Circuit affirmed the district court's conclusion that the owners and operators of the Provo Canyon School were acting under color of state law.[179]

The Tenth Circuit stated that the essential inquiry in determining when private action is action under color of state law is "whether the alleged infringement of Federal rights is fairly attributable to the state."[180] The court held that the extensive state involvement in funding the school, the knowing acquiesence of state agencies in Provo Canyon's use of the behavior modification program, and the state practice of mandating attendance at the school rendered the behavior modification program action under color of state law.[181] In reaching its decision the court distinguished *Rendell-Baker v. Kohn*,[182] a Supreme Court decision holding that state funding and regulation of a private school were insufficient, in and of themselves, to support a finding of action under color of state law when the school discharged employees.[183] In *Rendell-Baker*, the parties bringing the section 1983 action were discharged employees, not students.[184] The Supreme Court observed that because the state regulations did not compel or influence the decision to discharge the employees,[185] the school's action could not fairly be characterized as state action.[186] Thus, although state funding and regulation were not enough to create state action, the Tenth Circuit held that because the state agencies had approved of the practices challenged in *Milonas*, and had sent students to the school knowing they would be subjected to the challenged practices, use of the practices constituted state action.[187]

### B. *Determining When a State Actor's Actions are "State Action"*

*Gilmore v. Salt Lake Community Action Program*[188] arose when Gilmore was terminated from his position as Fiscal Director of the Salt Lake Community Action Program (SLCAP).[189] The plaintiff filed suit alleging that his termination involved state and federal action depriving him of a property interest without due process of law.[190] Gilmore asserted that because SLCAP was a state organized "community action agency" funded and regulated by Con-

178. *Id.* at 940.

179. *Id.* at 941.

180. *Id.* (citing Rendell-Baker v. Kohn, 457 U.S. 830 (1982)).

181. 691 F.2d at 940.

182. 457 U.S. 830 (1982).

183. *Id.* at 840-41.

184. *Id.* at 830.

185. *Id.* at 841.

186. *Id.* at 842. *See also id.* at 838 n.6.

187. 691 F.2d at 940. The First Circuit, in *Rendell-Baker*, had observed that students placed in the private school by state agencies "would have a stronger argument than do plaintiffs that the school's action *towards them* is taken 'under color of' state law, since the school derives its authority over them from the state." Rendell-Baker v. Kohn, 641 F.2d 14, 26 (1st Cir. 1981), *aff'd*, 457 U.S. 830 (1982)(emphasis in original).

188. 710 F.2d 632 (10th Cir. 1983).

189. *See id.* at 632-33.

190. *Id.* at 633.

gress[191] its actions necessarily involved state and federal action.[192]

The Tenth Circuit affirmed the district court's finding that no federal action was present by likening federal involvement in Gilmore's firing to the state involvement in *Rendell-Baker*.[193] Thus, although there was extensive federal funding and regulation of SLCAP, the lack of federal involvement in SLCAP's personnel policies and decisions precluded a finding of federal action.[194]

The court also held that Gilmore's termination did not involve state action.[195] This decision was reached after applying the two-part test for state action articulated in *Lugar v. Edmondson Oil Co.*,[196] a recent Supreme Court opinion. Under *Lugar*, state action is present when the alleged unconstitutional conduct results from a rule, policy, or decision attributable to the state, and when the defendant is a person who may be fairly characterized as a state actor.[197] The court found that although SLCAP was a state actor,[198] there were no allegations that its personnel policies or decisions reflected or embodied state policies or objectives.[199] Thus, although SCLAP was a state actor, the decision to terminate Gilmore did not involve state action[200] and accordingly could not be the subject of a section 1983 action.

## V. LIMITING PROSECUTORIAL IMMUNITY DURING PERFORMANCE OF ADMINISTRATIVE TASKS

In *Coleman v. Turpen*,[201] the Tenth Circuit heard a case which determined whether a plaintiff, who was deprived of property by a private party, could maintain an action under section 1983. In connection with Coleman's arrest, the Oklahoma City Sheriff's Department had seized Coleman's truck and camper worth $8,000, some tools worth $500, and $210 cash.[202] After seizing Coleman, the Sheriff's Department hired a private wrecker to tow and store the camper.[203] The company subsequently presented the Sheriff's Department with a substantial bill for storing the vehicle.[204]

191. SLCAP was organized under the aegis of Title II of the Economic Opportunity Act of 1964, 42 U.S.C. §§ 2781-2837 (1976) (repealed 1981). 710 F.2d at 634.

192. *See* 710 F.2d at 635.

193. *Id.* at 636.

194. *Id.*

195. *Id.* at 639.

196. 457 U.S. 922 (1982).

197. *Id.* at 937.

198. *See* 710 F.2d at 637. The court found that SLCAP was a state actor because the state was responsible for SLCAP's existence, and because many of SLCAP directors were public officials. *Id. Gilmore* indicates that the mere presence of public officials in a policymaking position may be sufficient to render an agency a state actor. *See id.* at 637 n.12.

199. *Id.* at 638-39.

200. *Id.* at 638. The Tenth Circuit explicitly recognized the apparent paradox of finding that the actions of a state actor were not "state action," but reasoned that a state should not be charged with responsibility for all actions taken by independent (i.e. nominally private) state actors. *See id.* at 638 n.13. The court recognized, however, that actions taken by state officials under state authority are undeniably "state action." *Id.*

201. 697 F.2d 1341 (10th Cir. 1983).

202. *Id.* at 1343. The ultimate disposition of the tools was unclear, *see id.*; for the purpose of this discussion it is assumed that the tools remained with the truck and camper.

203. *Id.*

204. *Id.*

Coleman was convicted of murder and received a death sentence.[205] None of the seized property, with the possible execption of the cash,[206] was used at Coleman's trial.[207] After his conviction, Coleman tried to recover his property and learned that his camper had been sold, with police permission, to cover the storage bill.[208] The authorities also refused to return the cash, alleging that they had a statutory duty to retain all evidence used at Coleman's trial until the death penalty was exacted.[209] Coleman then brought a section 1983 action against the sheriff, the public prosecutor, and the wrecker service.[210] The district court dismissed the suit as frivolous and also found that the prosecutor was absolutely immune from Coleman's suit, and that the sheriff was immune because of his statutory duty to retain the evidence.[211] Additionally, the district court held that the private wrecker was not acting under "color of state law" when it sold the camper, and that therefore that action could not subject any of the defendants to liability under section 1983.[212]

On appeal, the Tenth Circuit examined the alleged deprivation of cash separately from the deprivation of the camper and tools, in order to delineate the contours of the asserted due process violations and the asserted immunity defenses.[213]

### A. *Immunity for Retention of Possible Evidence*

As noted, the prosecutor and sheriff claimed to be keeping the cash in accordance with an Oklahoma statute.[214] Coleman alleged, however, that the money was not used as evidence in his trial.[215] The court of appeals held that because Coleman was not given an opportunity to show that the money was not used as evidence at trial, and therefore was not subject to retention under Oklahoma law, he had stated a claim of deprivation of his property without due process.[216] Thus, the trial court had erred in ruling that Coleman's section 1983 claim was frivolous with respect to the retained cash.[217]

The Tenth Circuit upheld the district court's ruling that the public prosecutor was absolutely immune for his role in keeping the cash.[218] The

205. *Id.*
206. *See id.* at 1344.
207. *Id.* at 1343.
208. *Id.*
209. *Id.* The prosecutor and sheriff claimed to be acting pursuant to OKLA. STAT. tit. 22, § 1327(1981 & Supp. 1983), which requires retention of all exhibits in capital cases until the death penalty has been carried out. *See id.* § 1327(A).
210. 697 F.2d at 1343.
211. *Id.*
212. *Id.*
213. *See id. See also infra* notes 214-33 and accompanying text.
214. OKLA. STAT. tit. 22, § 1327 (1981 & Supp. 1983). *See supra* note 210.
215. 697 F.2d at 1344.
216. *Id.*
217. *Id.*
218. *Id.* The Tenth Circuit found that absolute immunity was required by Imbler v. Pachtman, 424 U.S. 409 (1976), which confers absolute immunity on a public prosecutor for his conduct in "initiating a prosecution and in presenting the state's case." *Id.* at 431. The court found that retention of possible evidence was part of the prosecutor's presentation of his case. 697 F.2d at 1344.

court, however, rejected the categorical grant of immunity for the sheriff. The sheriff was only entitled to immunity if he did not know or could not reasonably have known that he was depriving Coleman of his constitutional rights.[219] Because Coleman claimed that his money was not introduced as evidence, the Oklahoma statute might not have been applicable. If the trial court found that Coleman's claim was true, it would be required to consider the sheriff's conduct to determine whether qualified immunity was available.[220] Hence, the trial court had improperly granted immunity to the sheriff.[221]

B. *Immunity for Administrative Disposition of Prisoner's Property*

Before reaching this immunity issue, the Tenth Circuit reversed the district court's finding that the private wrecker service's sale of the camper and tools was not action under color of state law.[222] The court once again relied heavily on *Lugar's* two-part test[223] for ascertaining the presence of state action.[224] The court of appeals held that by enacting a statute[225] which allowed a good faith purchaser of the truck and camper to take them free of Coleman's claims, Oklahoma had created the right to sell the truck exercised by the wrecker service.[226] This satisfied the first prong of the *Lugar* test.[227] With respect to the second prong, because the state expressly permitted the wrecker service to hold and sell the camper, the state had jointly participated with the private wrecker service in depriving Coleman of his property, rendering the sale action by a state actor.[228] Further, because Coleman had not received notice of the sale, and because there was no exigency precluding a predeprivation hearing, Coleman had stated a claim of unconstitutional state action.[229]

With respect to the immunity issue, the court of appeals found that the prosecutor, in participating in the disposition of property which was not used as evidence, had been acting in an administrative capacity and not as an advocate.[230] Therefore, the prosecutor had only a qualified immunity, which would shield him from liability only if he neither knew or should have known that the sale violated Coleman's constitutional rights.[231] As with the money, the sheriff enjoyed only a qualified immunity.[232]

219. 697 F.2d at 1344 (citing Harlow v. Fitzgerald, 457 U.S. 800, 815-20 (1982)).
220. 697 F.2d at 1344.
221. *See id.* at 1347.
222. *Id.* at 1345.
223. *See supra* note 197 and accompanying text.
224. *See* 697 F.2d at 1345.
225. OKLA. STAT. tit. 12A, § 7-210 (1981).
226. 697 F.2d at 1345.
227. *Id. See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
228. 697 F.2d at 1345. *See Lugar*, 457 U.S. at 937.
229. 697 F.2d at 1345 (citing Parratt v. Taylor, 451 U.S. 527, 539 (1981)).
230. 697 F.2d at 1346.
231. *Id.* The Tenth Circuit's decision resolved a question left open by Imbler v. Pachtman, 424 U.S. 409 (1976), where the Supreme Court distinguished between a prosecutor's roles as advocate and as administrator or investigator, but did not decide whether that difference justified different levels of immunity. *Id.* at 430-31.
232. 697 F.2d at 1347.

## VI. PRISONER'S RIGHTS UNDER SECTION 1983

### A. *Standards for Section 1983 Actions Involving Violence to Pretrial Detainees*

*Smith v. Iron County*[233] established the proposition that a prison guard's use of force against a prisoner is not always a constitutional violation. The plaintiff was a detainee-prisoner who was awaiting disposition of a burglary charge.[234] During the detention the jailer, who was on duty alone, heard a loud noise coming from the vicinity of plaintiff's cell.[235] The jailer saw the plaintiff on the floor under a bunk and, after inquiring what plaintiff was doing and providing plaintiff several opportunities to cooperate, sprayed the plaintiff with mace.[236] The jailer later recovered a six-pound iron drain cover with a jagged edge, which the plaintiff was allegedly using to dig through the cell wall.[237] After the incident, the plaintiff brought suit under section 1983 alleging that the macing incident constituted cruel and unusual punishment in violation of the eighth amendment,[238] and constituted a deprivation of liberty in violation of the fourteenth amendment.[239] The district court granted summary judgment to the defendants, finding that the undisputed facts did not support the conclusion that the defendant's conduct constituted a violation of plaintiff's constitutional rights.[240]

The Tenth Circuit affirmed the district court's decision.[241] Prior to considering the merits, however, the court reaffirmed its statement in *Littlefield v. Deland*[242] that a pretrial detainee's claim of unconstitutional punishment is to be evaulated through a due process analysis, rather than an analysis focusing on the "cruel and unusual" nature of the punishment.[243] Under the due process analysis, unconstitutional action is present when a jailer uses unreasonable force, or when a jailer uses force maliciously.[244]

Turning to the merits, the court noted that in most circumstances the use of mace would constitute excessive force giving rise to a valid section 1983 claim.[245] The court held, however, that the particular circumstances surrounding this macing incident—the jailer was on duty alone, there had been previous trouble with the plaintiff, there were two prisoners in the cell with the plaintiff, and the plaintiff had a dangerous object—were sufficient to prevent the guard's use of mace from violating the plaintiff's constitutional rights.[246]

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233. 692 F.2d 685 (10th Cir. 1982).
234. *Id.* at 685.
235. *Id.*
236. *Id.* at 686.
237. *Id.*
238. U.S. CONST. amend VIII. This amendment provides that "cruel and unusual punishments" shall not be inflicted. *Id.*
239. 692 F.2d at 686.
240. *See id.* at 685.
241. *Id.* at 688.
242. 641 F.2d 729 (10th Cir. 1981).
243. 692 F.2d at 687.
244. *Id.* (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom.* Employee-Officer John v. Johnson, 414 U.S. 1033 (1973)).
245. 692 F.2d at 686.
246. *Id.* at 687.

B. *Standards for Prisoner Section 1983 Actions Claiming Cruel and Unusual Punishment*

In *Sampley v. Ruettgers*[247] two inmates at the Wyoming State Penitentiary alleged they were beaten by a guard who was giving them haircuts.[248] Plaintiff Sampley alleged that a guard, without provocation, grabbed him by the throat, strangled him, slammed his head against a steel window, and then struck him several times with barber clippers, leaving an inch deep cut.[249] The guard was then alleged to have cut Sampley's hair, spit on the hair clippers, pushed plaintiff Martinez, and cut Martinez' hair without washing the saliva from the clippers.[250] The plaintiffs claimed in their section 1983 actions that the prison guard's conduct subjected them to cruel and unusual punishment and deprived them of liberty without due process.[251] An internal prison investigation concluded that no unnecessary force was used against the plaintiffs.[252] The district court dismissed the complaint on the basis of the prison report, despite the submission of conflicting pleadings and affidavits by plaintiffs.[253]

The circuit court treated the trial court's dismissal as a summary judgment for the defendants, thus requiring construction of the pleadings and affidavits in the plaintiffs' favor.[254] With this review posture, the court reversed the district court as to Sampley, but affirmed as to Martinez.[255] In reversing the district court's ruling on Sampley's complaint, the Tenth Circuit relied on *Estelle v. Gamble*[256] and held that a "prison guard's unauthorized beating of an inmate can violate the eighth amendment."[257] The court stated, however, that a prison guard's use of force against an inmate is cruel and unusual only if it involved "the unnecessary and wanton infliction of pain."[258] This standard required that a section 1983 claim alleging an eighth amendment violation include three elements.[259] First, the complaint must allege wanton conduct, which is shown by an intention to harm the inmate.[260] Second, the complaint must allege unnecessary conduct, which is the use of force exceeding that which appeared reasonably necessary, in the circumstances, to maintain or restore discipline.[261] Third, the inmate must have suffered pain exceeding momentary discomfort; the guard's attack must result in either severe pain or a lasting injury.[262]

247. 704 F.2d 491 (10th Cir. 1983).
248. *Id.* at 493.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* The Tenth Circuit noted that reliance on the prison report was improper because administrative findings could not be permitted to usurp the court's factfinding obligation. *Id.* at 493 n.3.
254. *Id.* at 493 n.2.
255. *Id.* at 496.
256. 429 U.S. 97 (1976).
257. 704 F.2d at 495.
258. *Id.* (citing Gregg v. Georgia, 428 U.S. 153, 173 (1976)).
259. 704 F.2d at 495.
260. *Id.*
261. *Id.*
262. *Id.*

The circuit court found that Sampley's complaint satisfied these three requirements and, because disputed issues of fact remained, reversed the district court's dismissal of the complaint.[263] The court held that Martinez, although he may have had state tort actions against the guard, had not stated a claim of cruel or unusual punishment under the *Sampley* test, and also held that the guard's conduct had not deprived Martinez of liberty.[264] Accordingly, the district court's dismissal of Martinez' complaint was affirmed.[265]

## VII. PROPRIETY OF AWARDING NOMINAL DAMAGES

In *Lancaster v. Rodriguez*[266] the Tenth Circuit addressed the issue of whether a nominal damage award is appropriate under section 1983 when a plaintiff proves a violation of his rights but is unable to prove actual injury.[267] Lancaster sought actual damages for violation of his eighth amendment right to be free from cruel and unusual punishment.[268] The trial court found that there was an eighth amendment violation without actual injury and, relying on the Supreme Court's *Carey v. Piphus*[269] decision, awarded only nominal damages.[270]

On appeal, the Tenth Circuit affirmed the district court, holding that damage awards in section 1983 actions are governed by the principle of compensation.[271] The circuit court refused to distinguish *Piphus*, which involved a procedural deficiency,[272] from Lancaster's substantive constitutional claim, stating that when no damages were shown to have resulted from the constitutional claim, the nature of the violation was insignificant.[273]

## VIII. MAXIMUM AWARD OF ATTORNEY'S FEES IN SECTION 1983 ACTION

The civil rights attorney's fees statute[274] provides that in the enforcement of a section 1983 action, the court, in its discretion, may award reasonable attorney's fees to the prevailing party.[275] In *Cooper v. Singer*,[276] the district court denied the plaintiffs an award of attorney's fees, despite their

263. *Id.* at 496.
264. *Id.*
265. *Id.*
266. 701 F.2d 864 (10th Cir.), *cert. denied*, 103 S.Ct. 3121 (1983).
267. *Id.* at 864.
268. *Id.*
269. 435 U.S. 247 (1978).
270. 701 F.2d at 864.
271. *Id.* In Carey v. Piphus, 435 U.S. 247 (1978), the Court recognized that compensation principles, which generally control the award of damages in the American legal system, were applicable to section 1983 actions. *See id.* at 254-57. *See generally* Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966 (1980).
272. *See* 435 U.S. at 248.
273. 701 F.2d at 866.
274. 42 U.S.C. § 1988 (Supp. V. 1981). This statute provides, in relevant part, that "[i]n any action . . . to enforce a provision of [section 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*
275. *See id.*
276. 689 F.2d 929 (10th Cir. 1983).

successful section 1983 action, because plaintiffs had a contingent fee agreement with their counsel.[277] The district court stated that the contingent fee arrangement made any award of attorney's fees unnecessary, because the arrangement fulfilled the purpose of the civil rights attorney's fees statute, which was to encourage plaintiffs to vindicate their civil rights by ensuring compensation for attorneys.[278] Any award in excess of the contingent fee would be an unnecessary "windfall" for the attorney.[279]

The Tenth Circuit reversed the district court.[280] Stating that the discretion allowed in awarding fees under the attorney's fees statute is extremely narrow, the court held that fees could be denied only when "special circumstances" were present.[281] Under this rule, a prevailing party will recover attorney's fees "unless special circumstances would render such an award unjust."[282] The court then held that the existence of a contingent fee arrangement does not itself constitute a "special circumstance" precluding an award of attorney's fees.[283] Rather, the contingency arrangement or any other contractually stipulated amount would be treated as the maximum fee permitted in the case, with attorney's fees awards used to harmonize the agreed on figure with the amount actually obtained through judgment.[284]

In a well-reasoned partial dissent, Judge Holloway disagreed with the majority's ruling that a fee arrangement establishes the maximum allowable fee.[285] Judge Holloway argued that neither the statute nor its history called for such a limitation.[286] The judge urged that the statute required the court to grant a fee sufficient to attract competent counsel, with that determination to be made on an objective basis, rather than by reference to the plaintiff's agreement with the lawyer.[287]

*Lenore A. Martinez*

277. *Id.* at 932.
278. *Id.* at 931.
279. *Id.*
280. *Id.* at 932.
281. *Id.* at 931 (citing Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968)).
282. *See* 689 F.2d at 931.
283. *Id.*
284. *Id.* at 932. The court noted that the district court could benefit a plaintiff by setting off the contingent fees amount through an award of statutory attorney's fees. *Id.*
285. *Id.* (Holloway, J., concurring in part and dissenting in part).
286. *Id.*
287. *Id.* at 934. Judge Holloway noted that lawyers may frequently accept low contingency fees for worthy reasons. *Id.*

# NOTE, STATUTES OF LIMITATIONS IN CIVIL RIGHTS ACTIONS—A SURVEY AND CRITIQUE OF TENTH CIRCUIT DECISIONS

## OVERVIEW

Congress' failure to specify a statute of limitations for cases brought under the Civil Rights Acts[1] has presented numerous difficulties for the federal courts. The Supreme Court in *O'Sullivan v. Felix*[2] approved the application of state statutes of limitations to civil rights actions.[3] In *Board of Regents v. Tomanio*,[4] the Court held that 42 U.S.C. § 1988[5] required application of state statutes of limitations.[6] The Court, however, has provided little guidance to the lower courts as to which state statute of limitations is most appropriate.[7] This lack of guidance[8] has led to divergent approaches among the circuit courts[9] and, in some instances, to the application of different approaches within the same circuit.[10]

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1. During the the Civil War era, Congress enacted a series of civil rights statutes which are collectively referred to as the Civil Rights Acts. *See* Comment, *Statutes of Limitation in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L.J. 98, 98 & n.1. The four Civil War civil rights statutes relevant to this comment are codified in title 42 of the United States Code. 42 U.S.C. § 1981 (1976) guarantees all citizens the right to contract, and the protection of the legal process, on the terms enjoyed by white citizens. 42 U.S.C. § 1982 (1976) guarantees all citizens the property rights enjoyed by white citizens. 42 U.S.C. § 1983 (Supp. V 1981) creates a civil remedy for persons deprived of federally secured rights by other persons acting under color of state law. 42 U.S.C. § 1985 (Supp. V 1981) creates a civil remedy for injury caused by conspiracies to deprive a person's civil rights, or to interfere with the equal administration of the law.

2. 233 U.S. 318 (1914).

3. *Id.* at 321-25. *Felix* held that because civil suits under the Civil Rights Acts are remedial in nature, a federal statute governing civil actions imposing fines or penalties was inapplicable. Given the absence of an explicit limitations period in the Civil Rights Acts, the district court properly applied a state limitation period. *Id.*

4. 446 U.S. 478 (1980).

5. 42 U.S.C. § 1988 (Supp. V 1981).

6. The court held that section 1988 requires application of state statutes of limitation unless the state law is "inconsistent with the constitution and the laws of the United States." Board of Regents v. Tomanio, 446 U.S. 478, 483-85 (1980). One commentator has concluded that section 1988 has been misinterpreted by the courts and that Congress never intended to incorporate state rules into federally created actions. Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980).

7. In the leading case of Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), the Court stated that the limited grant of certiorari foreclosed consideration of which state statute of limitation should be applied to an action under 42 U.S.C. § 1981. 421 U.S. at 462 n.7. In another section 1981 case, the Court also declined to examine the statute of limitations issue, stating: "We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so heavily contingent upon an analysis of state law. . . ." Runyon v. McCrary, 427 U.S. 160, 181 (1976).

8. The Court has stated that the federal courts should adopt the most analogous state statute of limitations. *Tomanio*, 446 U.S. at 483-84. This statement has failed to provide direction to the lower courts, however, because there is an ongoing debate as to which categories of state statutes of limitation are most analogous. For example, some circuits find tort statutes of limitation most analogous, while others find such statutes inherently inappropriate for federal civil rights actions. *See infra* notes 134-41 and accompanying text.

9. *See generally* Annot., 45 A.L.R. FED. 458 (1979); Annot., 29 A.L.R. FED. 710 (1976).

10. Various panels of the Eighth Circuit had taken inconsistent approaches to the application of state statutes of limitation. This conflict was finally resolved in Garmon v. Foust, 668

During this survey period, the Tenth Circuit grappled with statute of limitations issues, but did not articulate a precise standard. Accordingly, this comment will examine recent Tenth Circuit decisions involving the statute of limitations to be applied in civil rights actions. The analysis will focus on two issues: whether the Tenth Circuit is using a consistent standard for selecting the appropriate statute of limitations, and whether the problems associated with the Tenth Circuit's approach can be alleviated by adopting of a different analysis.

## I. ALTERNATIVE STATUTE OF LIMITATIONS APPROACHES

### A. *The Direct Analogy Approach*

The methods adopted by the various circuit courts for selecting the analogous state statute of limitations in civil rights cases can be divided into two general categories: the direct analogy approach and the uniform analogy approach. The courts in the first category analogize the alleged violation of federal rights to a common law tort or contract claim based upon the specific facts pled in the complaint. The practical application of this method is typified by the view of the Third Circuit that federal courts hearing cases under the Civil Rights Acts determine the analogous cause of action under state law, and then apply the limitation period which would have been applied had that action been brought in a state court.[11]

A direct analogy can be drawn with relative ease to intentional torts such as false imprisonment, assault, battery, and malicious prosecution.[12] Many cases arising under the civil rights statutes have no readily apparent common law counterpart, however, forcing the courts to draw contrived analogies. For example, in *Pennick v. Florala*[13] the Fifth Circuit considered a suit, based on sections 1982 and 1983 of the Civil Rights Acts,[14] alleging a lack of notice and opportunity to be heard prior to a zoning change which allowed a sanitary landfill to operate in the plaintiffs' neighborhood.[15] The court held that the alleged due process violations were analogous to a state court action for trespass on the case (subject to a one-year statute of limitations), rather than an action for trespass (subject to a six-year statute of limitations).[16] Obviously, both analogies were questionable characterizations of a due process violation. Further, because the direct analogy between the violation of a constitutional right and an action under common law is inherently imprecise, *Pennick* demonstrates that this approach allows the federal

F.2d 400 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982), which rejected the use of tort statutes of limitation, instead requiring the use of state statutes of limitation provided for liabilities created by statute, or similar generalized limitations statutes. 668 F.2d at 406 & nn.11-12.

11. Jennings v. Shuman, 567 F.2d 1213, 1216 (3d Cir. 1977).

12. In some states, even these analogies can be problematic. In *Jennings*, the federal court was forced to choose between a Pennsylvania statute providing a one-year limitation for malicious prosecution or false arrest, and a two-year limitation for claims based on false imprisonment and abuse of process. *Id.* at 1216.

13. 529 F.2d 1242 (5th Cir. 1976).

14. 42 U.S.C. §§ 1982, 1983 (1976 & Supp. V 1981).

15. 529 F.2d at 1243.

16. *Id.*

courts considerable flexibility in determining when a suit is barred by the statute of limitations.

### B. *The Uniform Analogy Approach*

While the approach described above necessitates an individualized examination based on the facts of each case, the courts which employ the uniform analogy approach avoid this task by applying one statute of limitations to all civil rights actions. These courts view federal civil rights actions as intrinsically similar, and seek the state analogue for that intrinsically similar class of actions. Several different types of statutes have been utilized by courts employing this method. Some circuits apply general state "catch-all" statutes of limitations, which govern actions not otherwise provided for.[17] Another alternative used by some circuits is the uniform application of a state statute of limitations for actions based upon a liability created or imposed by statute.[18] Other courts have adopted the state limitation for suits involving injury to a person or her rights.[19] Finally, some states have enacted statutes of limitation which apply specifically to civil rights actions.[20]

## II. THE TENTH CIRCUIT'S APPLICATION OF THE DIRECT ANALOGY APPROACH

### A. *Early Cases*

Until recently, the Tenth Circuit had not developed a cogent approach to the problem of determining the appropriate statute of limitations in civil rights actions. In several early opinions, the court applied state statutes providing for a two-year limitation on "actions for injury to rights of another not arising on contract."[21] These opinions, however, do not include any substantive discussion of the court's rationale for using this two-year statute of limitations.[22]

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17. *See, e.g.*, Garmon v. Foust, 668 F.2d 400 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982); Rinehart v. Locke, 454 F.2d 313 (7th Cir. 1971); Franklin v. City of Marks, 439 F.2d 665 (5th Cir. 1971).

18. *See, e.g.*, Pauk v. Board of Trustees, 654 F.2d 856 (2d Cir. 1981); Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977).

19. *See, e.g.*, Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972) (concluding that every well-founded civil rights cause of action under section 1983 results in a "personal injury").

20. *See, e.g.*, Harrison v. Wright, 457 F.2d 793 (6th Cir. 1972), where the court applied TENN. CODE ANN. § 28-304 (1955) (current version at TENN. CODE ANN. § 28-3-104 (1980)), a statute of limitation explicitly applicable to federal civil rights actions. *But cf.* Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978), where the court refused to apply VA. CODE § 8-24 (1950), a one-year statute of limitation specifically governing section 1983 actions. The court characterized this limitation as an impermissible discrimination against a federal cause of action, 582 F.2d at 1319. This discriminatory provision has been eliminated from Virginia's current statutes of limitations framework. *See* VA. CODE. § 8.01-243 (1977); Steward v. Norfolk, F. & D. Ry., 486 F. Supp. 744 (E.D. Va. 1980), *aff'd*, 661 F.2d 927 (4th Cir. 1981).

21. Crosswhite v. Brown, 424 F.2d 495, 496 (10th Cir. 1970) (applying 12 OKLA. STAT. § 95 (1951)) (current version at 12 OKLA. STAT. § 95 (1981)); Wilson v. Hinman, 172 F.2d 914 (10th Cir.), *cert. denied*, 336 U.S. 970 (1949) (applying KAN. GEN. STAT. § 60-306 para. 3 (1935)) (current version at KAN. STAT. ANN. § 60-513(a)4 (1976)).

22. The opinions in both of these cases devoted only one paragraph to the statute of limitations issue. *See Crosswhite*, 424 F.2d at 496; *Wilson*, 172 F.2d at 915.

The case of *Zuniga v. Amfac Foods, Inc.*[23] marked the first time that the Tenth Circuit provided an in-depth analysis of the statute of limitations issue in civil rights actions. In this 1978 case, the plaintiff brought an action under section 1981 of the Civil Rights Act[24] against his employer, alleging that the plaintiff was refused reinstatement because of his national origin.[25] The employer argued that because more than four years had elapsed since Zuniga's cause of action accrued, the suit should be barred under either a two-year statutory limitation for federally created actions or a three-year "residuary" statute.[26] In the decision the court discussed, for the first time, the various approaches used in deciding which state statute of limitations was applicable to section 1981 actions. The court rejected the Seventh Circuit's method of applying a uniform limitation for all statutory claims,[27] instead adopting the Third Circuit's approach of analyzing the particular allegations of a civil rights claim and determining the comparable state analogue.[28] Utilizing this approach, *Zuniga* held that the appropriate Colorado statute of limitations was a six-year period for "[a]ll actions of assumpsit, or on the case founded on any contract or liability, express or implied" and for "[a]ll other actions on the case, except for slander and for libel."[29]

*Zuniga* selected the direct analogy approach because the court found that approach more consistent with the Supreme Court's decision in *UAW v. Hoosier Cardinal Corp.*,[30] which articulated the appropriate statute of limitations inquiry for actions brought pursuant to collective bargaining agreements. *Hoosier Cardinal* held first that Congress' failure to include a specific limitation period indicated an intent to adopt the "appropriate state statute of limitations."[31] Courts were therefore required to determine how state law would characterize the federal action, and then adopt the statute of limitations provided for the state analogue.[32] Further, although the question of the appropriate characterization was ultimately a question of federal law,[33] a state's characterization of the action was to be accepted unless unreasonable or inconsistent with federal policy.[34] Although the Tenth Circuit did not find *Hoosier Cardinal* controlling, they found that its analysis dictated use of the direct analogy approach under section 1981.[35] Applying that approach, they found Zuniga's action viable.[36]

*Brogan v. Wiggins School District*[37] was another civil rights case decided by

23. 580 F.2d 380 (10th Cir. 1978).
24. 42 U.S.C. § 1981 (1976).
25. 580 F.2d at 381, 387.
26. *Id.* at 382, 387. *See* COLO. REV. STAT. §§ 13-80-106, -108 (1973).
27. 580 F.2d at 383.
28. *Id.* (citing Meyers v. Pennypack Woods Home Ownership Ass'n., 559 F.2d 894 (3d Cir. 1977)).
29. 580 F.2d at 386 (quoting COLO. REV. STAT. § 13-80-110(1)(d), (g) (1973)).
30. 383 U.S. 696 (1966).
31. *Id.* at 703-05.
32. *Id.* at 706.
33. *Id.*
34. *Id.*
35. 580 F.2d at 383.
36. *Id.* at 386-87.
37. 588 F.2d 409 (10th Cir. 1978).

the Tenth Circuit in 1978. *Brogan* involved an employment discrimination case brought under section 1983.[38] The court noted that *Zuniga* had established the appropriate analogy for section 1981 actions, but did not engage in an analysis of the state law analogue to the employment discrimination claim.[39] Instead, the court declared that because section 1983 is based on a policy of protecting fundamental rights, when there is a choice between two statutes of limitations, the longer statute should be applied.[40]

In 1979, the Tenth Circuit affirmed the trial court's choice of a state statute of limitations in two cases. The first of these cases, *Hansbury v. Regents of the University of California*,[41] was a section 1983 employment discrimination case in which the trial court dismissed the plaintiff's claim as barred by New Mexico's four-year limitation for actions "founded on unwritten contracts . . . and all other actions not otherwise provided for."[42] The second case, *Spiegel v. School District No. 1*,[43] involved a Wyoming school teacher who sought damages under section 1983 for the termination of his employment in violation of his first amendment rights.[44] The Tenth Circuit affirmed the trial court's application of Wyoming's two-year limitation for "actions upon a liability created by a federal statute."[45]

In a 1980 case, *Brown v. Bigger*,[46] the Tenth Circuit in a per curiam opinion affirmed the lower court's dismissal of a civil rights action brought by an inmate at the Kansas State Penitentiary.[47] The plaintiff, Brown, alleged that the prison guards subjected him to cruel and unusual punishment during his incarceration.[48] The district court held that Brown's section 1983 suit was barred by Kansas' two-year statute of limitations for unenumerated injuries to the rights of another.[49] The Tenth Circuit, without discussion, agreed with the trial court's choice of the statute of limitations.[50]

Two months after *Brown* the Tenth Circuit decided *Shah v. Halliburton Co.*[51] In that employment discrimination action under section 1981 the court rejected the district court's application of Oklahoma's two-year limitation for "injury to the rights of another"[52] and applied Oklahoma's three-year statute of limitations for actions on an unwritten contract and actions

38. *Id.* at 410.

39. *Id.* a 412.

40. *Id.* Under Colorado law a court will always be presented with two possible statutes of limitations, because COLO. REV. STAT. § 13-80-106 (1973) provides that actions brought on liabilities created by federal statute must be brought either within two years or within a longer period provided for a comparable state action, if any. *Id.*

41. 596 F.2d 944 (10th Cir. 1979).

42. *Id.* at 949. *See* N.M. STAT. ANN. § 37-1-4 (1978).

43. 600 F.2d 264 (10th Cir. 1979).

44. *Id.* at 265.

45. *Id. See* WYO. STAT. § 1-3-115 (1977).

46. 622 F.2d 1025 (10th Cir. 1980).

47. *Id.* at 1026.

48. *Id.*

49. *Id. See* KAN. STAT. ANN. § 60-513(a)(4) (1976).

50. 622 F.2d at 1026. Brown's status as a prisoner tolled the statute of limitations, and therefore his claim was timely under section 60-513(a)(4). *See* 622 F.2d at 1026.

51. 627 F.2d 1055 (10th Cir. 1980).

52. *See* OKLA. STAT. tit. 12, § 95 para. 3 (1981).

upon a liability created by statute.[53] Judge Seymour, writing for a unanimous court, applied the reasoning of *Brogan*, which stated that when there is a choice between two statutes of limitations in a civil rights action, the longer limitation should apply as a matter of policy.[54]

In the following year, 1981, the Tenth Circuit considered a section 1982 housing discrimination action brought by a black purchaser of a home in a predominantly white development.[55] Although the court in *Denny v. Hutchinson Sales Corp.*[56] held for the defendant, it did state that the plaintiff's action was timely.[57] Addressing the limitations issue, the court first held that the time limitations of the Fair Housing Act[58] do not apply to a section 1982 suit.[59] The court, however, failed to indicate what the appropriate statute of limitations should be, concluding only that under Colorado law the applicable statute of limitations could not be less than two years, and the action was therefore timely.[60]

In *Childers v. Independent School District No. 1*,[61] a 1982 case, the Tenth Circuit held that the six-month limitation period of the Oklahoma Political Subdivision Tort Claims Act[62] was not applicable to claims brought under section 1983 because the short period was "inconsistent with the broad remedial purposes of the federal civil rights acts."[63] The procedural posture of *Childers* did not require the court to articulate the applicable statute of limitations.[64] The decision remains significant, however, because in rejecting the statute of limitations claim the Tenth Circuit accentuated the intrinsic difference between a state tort action and the alleged deprivation of a constitutional right.[65]

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53. 627 F.2d at 1058. *See* OKLA. STAT. tit. 12, § 95 para. 2 (1981).

54. *Id.* at 1059. *See Brogan*, 588 F.2d at 410.

55. *See* Denny v. Hutchinson Sales Corp., 649 F.2d 816, 819 (10th Cir. 1981).

56. 649 F.2d 816 (10th Cir. 1981).

57. *Id.* at 820.

58. 42 U.S.C. §§ 3601-3631 (1976 & Supp. V 1981).

59. 649 F.2d at 820.

60. *Id. See* COLO. REV. STAT. § 13-80-106 (1973). As explained above, Colorado sets a two year minimum statute of limitations for actions based on federally created liabilities. *See supra* note 40.

61. 676 F.2d 1338 (10th Cir. 1982).

62. OKLA. STAT. tit. 51, §§ 151-170 (1981). The six-month limitation period is located at *id.* § 156.

63. 676 F.2d at 1343. The court also observed that states generally cannot require plaintiffs to "jump through procedural hoops" in order to assert a federal civil rights claim. *Id.* (quoting Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1162 (9th Cir. 1976) (en banc)).

64. The Political Subdivision Tort Claims Act was offered only as an alternate ground for upholding the trial court's FED. R. CIV. P. 12(b)(6) dismissal of plaintiff's suit. 676 F.2d at 1342.

65. 694 F.2d at 1342-43 (citing Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring) (deprivation of constitutional right different from, and more serious than, mere tort); Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977) (limitation periods must be generous to preserve Act's remedial purposes); Sethy v. Alameda County Water Dist., 454 F.2d 1157 (9th Cir. 1976) (civil rights plaintiffs not subject to state "procedural hoops"); Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970) (civil right not analogous to state created right to recover for municipality's torts)).

B. *Recent Cases*

1. *Jones v. Hildebrant*

In January, 1983 the Tenth Circuit decided *Jones v. Hildebrant*,[66] an appeal from the United States District Court for the District of Colorado. Ruby Jones brought suit under section 1983 as special administrator of the estate of her son, who was killed by a Denver police officer. The district court's decision to hold that the claim was barred by the statute of limitations was reached by characterizing the facts of the complaint as analogous to the torts of assault and battery, which are subject to a one-year statute of limitations under Colorado law.[67] The court then applied a Colorado statute creating a two-year limitation for a federally created liability unless the period for comparable actions under Colorado law is longer.[68] Because the limitation for the comparable action (assault and battery) was only one year, the two-year period was deemed appropriate. Mrs. Jones' action was dismissed by the district court, however, because more than five years had passed since the death of her son.[69]

The Tenth Circuit reversed this ruling on the ground that the plaintiff's cause of action was more properly characterized as analogous to the tort of reckless misconduct, and thus subject to a six-year limitation.[70] In addition, the court found that application of the longer statute of limitations "comports more favorably with the intent of Congress when it enacted civil rights remedies."[71] The court reiterated the policy expressed in *Shah v. Halliburton Co.* that when there appears to be a choice between two different characterizations, the longer statute of limitations should be applied "to effectuate the broad purpose of civil rights legislation."[72]

2. *Clulow v. Oklahoma*

Clulow brought suit under sections 1983 and 1985 against the State of Oklahoma and various individual defendants for alleged violations of his due process rights resulting in involuntary commitments to mental institutions and suspension from the Oklahoma Bar Association.[73] In his appeal to the Tenth Circuit, Clulow conceded that the trial court's application of a two-year statute of limitations was correct, but argued that a tolling provision should apply.[74] Nevertheless, the Tenth Circuit discussed and determined which Oklahoma statute of limitations was appropriate in this case. The court stated that the only two available limitations periods were a one-

66. No. 80-2220 (10th Cir. January 27, 1983). Although *Jones* was not selected for official publication, it retains precedential value equal to a published opinion. 10TH CIR. R. 17(c).

67. COLO. REV. STAT. § 13-80-102 (1973).

68. *Id.* § 13-80-106.

69. No. 80-2220, slip op. at 5.

70. *See* COLO. REV. STAT. § 13-80-110 (1973). *See also* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 525 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979) (applying section 13-80-110 to claim of reckless misconduct).

71. No. 80-2220, slip op. at 7.

72. *Id.* at 8.

73. Clulow v. Oklahoma, 700 F.2d 1291, 1293 (10th Cir. 1983).

74. *Id.* at 1299. The court rejected Clulow's tolling argument after finding that his claims did not involve continuing torts and that there was no showing of concealment. *Id.* at 1300-01.

year period provided for intentional torts, or a two-year period provided for "injury to the rights of another."[75] Following the *Zuniga* approach, which requires a determination of the analogous action under state law, the court found that the applicable limitation was Oklahoma's two-year period for "injury to the rights of another."[76] The court justified its choice, by stating that "most of plaintiff's claims can be characterized as specific torts such as false imprisonment only by rather loose analogy. The more general tort of interference with individual rights . . . is a better analogue."[77]

3. *Garcia v. University of Kansas*

Garcia's section 1981 and section 1983 employment discrimination suit, *Garcia v. University of Kansas*,[78] was dismissed by the district court as barred by a Kansas two-year limitation for actions based on injury to the rights of another.[79] The Tenth Circuit affirmed, stating that the courts, by characterizing the cause of action as an alleged violation of the plaintiff's constitutional rights, should not be concerned with either how the rights were violated, the status of the defendant, or the manner in which the cause of action was created.[80] The court concluded "that the nature of the cause of action is the fundamental consideration."[81] Citing *Crosswhite v. Brown*[82] and *Wilson v. Hinman*,[83] two previous Tenth Circuit decisions addressing the applicable statute of limitations in section 1983 actions, the court stated that "injury to the rights of another" most nearly described the nature of plaintiff's cause of action.[84] Hence, the two-year limitation was applicable.[85]

Judge Seymour dissented, stating that the majority opinion could not be reconciled with *Shah* and *Zuniga*.[86] The dissent expressed the view that both *Shah* and *Zuniga* require an analysis of the particular allegations of the claim, rather than the "rote utilization of a single type of limitations statute."[87] Judge Seymour further asserted that the standard adopted by the majority may present difficulties in some of the states in the Tenth Circuit because of the diversity among the state statutes of limitations. She observed that Colorado, Utah, and New Mexico laws, for example, did not contain a provision similar to the Kansas, Oklahoma, and Wyoming limitations period provided for injury to the rights of another.[88] Judge Seymour recognized that varying limitations periods between states were permissible under the

75. *Id.* at 1299. *See* OKLA. STAT. tit. 12, § 95 para. 3 (1981) (two-year period for injuries to rights of another); *id.* § 95 para. 4 (one-year period for intentional torts).
76. 700 F.2d at 1299. *See* OKLA. STAT. tit. 12, § 95 para. 3 (1981).
77. 700 F.2d at 1299. The court also noted that the two-year limitation was not "so unreasonably short as to defeat federal policy." *Id.* at 1300 n.12.
78. 702 F.2d 849 (10th Cir. 1983).
79. *Id.* at 850. *See* KAN. STAT. ANN. § 60-513(a)(4) (1976).
80. 702 F.2d at 850.
81. *Id.*
82. 424 F.2d 495 (10th Cir. 1970).
83. 172 F.2d 914 (10th Cir.), *cert. denied*, 336 U.S. 970 (1949).
84. 702 F.2d at 851.
85. *Id.*
86. *Id.* (Seymour, J., dissenting).
87. *Id.*
88. *Id.* at 853.

Civil Rights Acts,[89] but felt that a consistent analytical framework for choosing the most analogous state limitation was nonetheless necessary.[90] Applying the framework adopted in *Zuniga*, Judge Seymour concluded that Garcia's claim could be characterized as either an action for injury to the rights of another (two-year limitation),[91] or an action upon a liability created by statute (three-year limitation).[92] Under the rationale of *Shah*, the longer statute should have been applied.[93]

## III. CRITIQUE

### A. *Consistency Within the Tenth Circuit*

Judge Seymour correctly observed that the majority opinion in *Garcia* has deviated from the direct analogy approach announced in *Zuniga*. *Zuniga* emphasized that the analogous state statute of limitations should be selected after "analysis of the particular allegations of the claim,"[94] that "critical analysis of the particular claim" was necessary,[95] and that prior Tenth Circuit decisions had pointed the way to the direct analogy approach by "detailing the allegations of unconstitutional acts."[96] Further, *Zuniga* rejected the uniform analogy approach, which requires a court to determine the state analogue for an entire class of civil rights violations.[97] Thus, Chief Judge Seth's majority opinion, insofar as its emphasis on ascertaining the *nature* of the civil rights violation[98] is indicative of the use of a uniform analogy approach,[99] has created an inconsistency within the Tenth Circuit.

Although Judge Seymour's dissent in *Garcia* highlights the majority's failure to follow *Zuniga*, her criticism fails to acknowledge that the Tenth Circuit had previously deviated from the direct analogy approach in *Spiegel*, *Hansbury*, and *Brown*. These three decisions are indicative of the uniform analogy approach because no attempt was made to analogize the civil rights claim to its comparable state analogue.[100] Thus, it would appear that *Garcia* crystallizes two inconsistent lines of precedent which had previously arisen in the Tenth Circuit: *Zuniga*, *Shah*, *Jones*, and *Clulow* adhere to the direct analogy approach, while *Hansbury*, *Spiegel*, *Brown*, and *Garcia* follow the uniform approach.[101] The state of law in the Tenth Circuit is even more complex

89. *Id.* (citing Board of Regents v. Tomanio, 446 U.S. 478, 489 (1980)).
90. 702 F.2d at 853 (Seymour, J., dissenting).
91. *Id. See* KAN. STAT. ANN. § 60-513(a)(4) (1976).
92. 702 F.2d at 853 (Seymour, J., dissenting). *See* KAN. STAT. ANN. § 60-512(2) (1976).
93. 702 F.2d at 853 (Seymour, J., dissenting).
94. 570 F.2d at 383.
95. *Id.*
96. *Id.*
97. *See* Beard v. Robinson, 563 F.2d 331, 336 (7th Cir. 1977). *Zuniga* explicitly rejected the *Robinson* approach. 570 F.2d at 383.
98. *See* 702 F.2d at 850.
99. *Cf. Garcia*, 702 F.2d at 852-53 (Seymour, J., dissenting) (Tenth Circuit precedent rejects an approach failing to analyze particular allegations of a claim; therefore "rote utilization" of a particular limitations statute is improper).
100. *See supra* notes 17-20 and accompanying text.
101. The difference in approach cannot be explained solely by the make-up of the panels hearing the cases. In fact, the same judges have participated in opinions following both approaches. For example, Judge Barrett joined the opinions in *Brown* and *Spiegel* as well as *Zuniga*.

than indicated by the existence of conflicting precedents, however, because there are numerous inconsistencies within each line of precedent.

The uniform approach requires the court to designate one characterization which will serve as the state analogue for all civil rights actions. This characterization should apply uniformly to all states within a circuit.[102] Rather than select one statute as appropriate for civil rights actions, the Tenth Circuit cases following the uniform analogy approach have vacillated among various possibilities and applied three different types of statutes of limitations. *Hansbury* utilized New Mexico's statute for actions founded on unwritten contract or not otherwise provided for.[103] *Spiegel* was decided in the same year as *Hansbury*, yet the court selected a two-year limitation period for actions based on liabilities created by federal statute.[104] Several months after *Spiegel*, *Brown* ignored the Kansas limitation for liability created by statute and applied the limitation period for injury to the rights of another.[105] Thus, there is clearly a lack of uniformity among the cases which apparently follow the uniform approach.[106]

Similarly, the Tenth Circuit has also misapplied the direct analogy approach. This approach requires the court to examine the facts underlying the complaint and then select the most comparable common law tort or contract action.[107] In applying this approach, the Tenth Circuit has often found the most analogous state cause of action to be a general characterization, which is indicative of the uniform approach, rather than a specific common law tort. For example, Judge Seymour's dissent in *Garcia* suggests that the appropriate state analogue is "an action upon liability created by statute"[108] rather than an action upon an implied contract.[109] In *Shah*, Judge Seymour also held that a section 1981 claim "can clearly be construed as one based upon a liability created by statute."[110] These statements are indicative of the uniform analogy approach, despite the fact that the direct analogy approach is purportedly being followed.

Finally, *Childers* adds to the difficulties facing litigants involved in civil

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Chief Judge Seth also joined the opinion in *Zuniga* before he embraced the uniform analogy approach in *Garcia*.

102. The fact that all states in a circuit do not have identical statutes does not preclude application of the uniform approach. For example, the Ninth Circuit has uniformly applied the limitation for liabilities created by statute. Washington has no such statute. Therefore, the circuit court examined Washington's statutes of limitation and found that the limitation governing injury to the person or rights of another best serves the interests which section 1983 was designed to protect. *See* Rose v. Rinaldi, 654 F.2d 546 (9th Cir. 1981).

103. N.M. STAT. ANN. § 37-1-4 (1978).

104. WYO. STAT. § 1-3-115 (1977).

105. KAN. STAT. ANN. § 60-513(a)(4) (1976).

106. Ironically, Spiegel's claim would have been timely if the Wyoming limitation for "injuries to the rights of the plaintiff," WYO. STAT. § 1-3-105 (1977), had been applied. Similarly, Brown's claim would have been timely if the court had applied Kansas' limitation period for actions upon a liability created by statute, KAN. STAT. ANN. § 60-512(2) (1976).

107. *Zuniga* adopted the Third Circuit approach, which requires the court to "assess the similarity of the various state law torts." Meyers v. Pennpack Woods Home Ownership Ass'n, 559 F.2d 894, 901 (3d Cir. 1977), *adopted in Zuniga*, 580 F.2d at 383.

108. 702 F.2d at 853 (Seymour, J., dissenting); *see* KAN. STAT. ANN. § 60-512(2) (1976).

109. *See* KAN. STAT. ANN. § 60-512(1) (1976). Although both provisions have identical limitations periods, the problem with Judge Seymour's dissent is her methodology, not her result.

110. 627 F.2d at 1059.

rights actions in the Tenth Circuit. By emphasizing the intrinsic difference between federal civil rights actions and state tort actions,[111] *Childers* increases the uncertainty in determining the appropriate state analogue. Moreover, *Childers* rejected the limitations period of the Oklahoma Political Subdivision Tort Claims Act by citing authority which contradicts the conceptual framework of the direct analogy approach.[112]

### B. *Problematic Aspects of the Direct Analogy Approach*

Despite the inconsistencies in the Tenth Circuit opinions, the direct analogy approach remains the only method the court has explicitly approved for determining the applicable statute of limitations in a federal civil rights action. This section examines some problems inherent in the direct analogy approach, and then discusses the implications of those problems in terms of the policies served by the federal civil rights acts specifically, and statutes of limitations generally.

#### 1. State Court Decisions in Civil Rights Actions

Federal courts using the direct analogy approach must give deference to a state court's characterization of that state's statute of limitations analogue.[113] Essentially, unless the state court's characterization is unreasonable or inconsistent with federal policy, federal courts must follow the state decision.[114] Several recent state court decisions have rejected analogues selected by the Tenth Circuit and the federal district courts within its jurisdiction,[115] thereby creating a possibility of increased inconsistency within the Tenth Circuit.

In *DeVargas v. State ex rel. New Mexico Department of Corrections*,[116] the New Mexico Court of Appeals held that the two-year limitation period of the New Mexico Tort Claims Act[117] was applicable to a section 1983 suit against a New Mexico state employee.[118] *DeVargas* rejected the analysis set out by the United States District Court for the District of New Mexico in an earlier case, which had held that state tort claims acts are based on state concepts of sovereign immunity alien to the purposes to be served by the

111. *See supra* notes 63-65 and accompanying text.

112. See *Childers*, 676 F.2d at 1343 (citing Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977); Sethy v. Alameda County Water Dist., 545 F.2d 1157 (9th Cir. 1976) (en banc); Donovan v. Riebold, 433 F.2d 738 (9th Cir. 1970); *see also* Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring), *cited in Childers*, 676 F.2d at 1343.

113. *See* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 706 (1965), *quoted in Zuniga*, 580 F.2d at 383.

114. *Hoosier Cardinal*, 383 U.S. at 706, *quoted in Zuniga*, 580 F.2d at 383.

115. DeVargas v. State *ex rel.* New Mexico Dep't of Corrections, 97 N.M. 450, 640 P.2d 1327 (1981), *cert. dismissed as improvidently granted*, 97 N.M. 563, 642 P.2d 167 (1982); Miller v. City of Overland Park, 231 Kan. 557, 646 P.2d 1114 (1982). Federal and state courts have concurrent jurisdiction under the federal civil rights statutes. S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 16 (1979).

116. 97 N.M. 447, 640 P.2d 1327 (1981), *cert. dismissed as improvidently granted*, 97 N.M. 563, 642 P.2d 167 (1982).

117. N.M. STAT. ANN. §§ 41-4-1 to -29 (1978). The two-year limitation period is located at § 41-4-15.

118. 97 N.M. at 451, 640 P.2d at 1331.

Civil Rights Acts, and therefore cannot provide the statute of limitations in a section 1983 action.[119] The New Mexico Court of Appeals rejected this reasoning and held that the tort claims act is consistent with the purposes of section 1983, because the act is based on a waiver of immunity which subjects law enforcement officials to liability, consistent with the purposes of section 1983.[120] The New Mexico Supreme Court later dismissed DeVargas' petition for certiorari, finding no fault with the analysis used by the Court of Appeals.[121]

*Miller v. City of Overland Park*,[122] a 1982 Kansas Supreme Court decision, held that plaintiff's section 1983 suit was comparable to a state suit for false arrest and thus subject to a one-year statute of limitations.[123] Although the Kansas Supreme Court recognized that in *Wilson v. Hinman* and *Brown v. Bigger* the Tenth Circuit had applied Kansas' two-year statute of limitations to section 1983 actions,[124] the supreme court concluded that "when our legislature has specifically adopted a lesser period of time for certain specific types of action, we believe such time limits should also apply to a § 1983 cause of action. . . ."[125] Although the court justified its decision by distinguishing *Hinman* and *Brown*,[126] it clearly rejected the Tenth Circuit's policy of using the longer of two possible limitations periods.[127]

Both *DeVargas* and *Miller* reject federal precedent, *DeVargas* explicitly[128] and *Miller* implicitly.[129] According to the rationale of *Zuniga* the Tenth Circuit should accept the state courts' characterizations and apply Kansas' one-year statute of limitations if similar civil rights actions similar to the *Miller* case arise in Kansas, and the New Mexico Tort Claims Act's two-year limitation for New Mexico cases similar to *DeVargas*. Thus, the analogy approach might require the circuit to abandon its own precedent, and instead adopt the rulings of the state courts.[130]

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119. *See* Gunther v. Miller, 498 F. Supp. 882 (D.N.M. 1980).

120. 97 N.M. at —, 640 P.2d at 1331. One commentator, however, after analyzing *Gunther* and *DeVargas* concluded: "[T]he thrust of state tort law, with its immunity doctrines, is in direct opposition to the purposes of section 1983." Kovnat, *Constitutional Torts and the New Mexico Tort Claims Act*, 13 N.M.L. REV. 1, 50 (1983).

121. *See* DeVargas v. State *ex rel.* New Mexico Dep't of Corrections, 97 N.M. 563, 642 P.2d 167 (1982). *DeVargas* has been criticized by New Mexico commentators as failing to accomodate the federal policy concerns present in federal civil rights actions, Kovat, *supra* note 120, at 45-50, and as a source of confusion and inconsistency for New Mexico civil rights litigants. Comment, *Federal Civil Rights Act—The New Mexico Appellate Courts' Choice of the Proper Limitations Period for Civil Rights Actions Filed Under 42 U.S.C. § 1983:* DeVargas v. State *ex rel.* New Mexico Department of Corrections, 13 N.M.L. REV. 555, 561-65 (1983).

122. 231 Kan. 557, 646 P.2d 1114 (1982).

123. *Id.* at 562-63, 646 P.2d at 118. *See* KAN. STAT. ANN. § 60-514(2) (1976).

124. Kansas provides a two-year limitation period for actions based on injuries to the rights of another, KAN. STAT. ANN. § 60-513(a)(4) (1976).

125. 231 Kan. at 562, 646 P.2d at 1118.

126. *Id.* at 560, 646 P.2d at 1118.

127. *See, e.g., Shah*, 627 F.2d at 1059; *Brogan*, 588 F.2d at 410.

128. *See supra* text accompanying notes 117-19. *DeVargas* also implicitly rejected *Hansbury*, which had applied a four-year statute of limitations to a section 1983 action brought in New Mexico district court. *See supra* notes 40-41 and accompanying text.

129. *See supra* text accompanying note 125.

130. *Miller* stated that its characterization of the state law analogue was binding on the federal courts, 231 Kan. at 559, 562, 646 P.2d at 118. This statement is incorrect. *See supra* notes 6 and 31 and accompanying text.

2. Minimal Time Period

In determining the appropriate statute of limitations for a civil rights action, the court should take account of policy considerations relating to the federal civil rights statutes. The Tenth Circuit has stated that when there is a choice between several seemingly appropriate statutes of limitations, the longer statute should apply in light of the policy protecting fundamental rights.[131] Additionally, the Tenth Circuit has stated that the state statute of limitations must be "sufficiently generous in the time periods to preserve the remedial spirit of federal civil rights actions."[132] The court, however, has not clearly defined the minimal time period which would be consistent with the policy of the civil rights statutes.

Some circuits have applied a general rule that a federal court should not select a state statute of limitations shorter than two years in a civil rights action.[133] The Tenth Circuit has not officially adopted this principle, but there has never been a case in which the circuit approved the application of a limitation period of less than two years. There are states within the Tenth Circuit, however, which have time limitations of less than two years for certain tort actions which are most analogous to some civil rights claims. For example, several states in the Tenth Circuit provide a one-year limitation for intentional torts such as false imprisonment, assault, and battery, which might be applicable to a civil rights action.[134] Many section 1983 actions resulting from wrongful conduct by police officers will be comparable to these torts. Thus, the circuit court might be faced with the option of applying a one-year limitation, or of deviating from the approach of selecting the comparable cause of action under state law. This problem does not arise under the uniform analogy approach, because the applicable limitation period is selected after consideration of the appropriate minimal time period.[135]

3. Fragmentation of the Civil Rights Claim

Another problem that often arises in civil rights cases is that the allegations of the complaint may be comparable to several actions, which are subject to different statutes of limitations under state law. Again, this problem

131. *See Shah*, 627 F.2d at 1059; *Brogan*, 588 F.2d at 412.

132. *Childers*, 676 F.2d at 1343 (citing Shouse v. Pierce County, 559 F.2d 1142, 1146 (9th Cir. 1977)).

133. Pauk v. Board of Trustees, 654 F.2d 856, 862 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) (stating that the two-year limitations of 28 U.S.C. §§ 1346(b), 2680(h) (1976) are an expression of federal policy which should establish a floor for section 1983 suits).

134. *See* KAN. STAT. ANN. § 60-514(2) (1976); OKLA. STAT. tit. 12, § 95 para. 4 (1981); UTAH CODE ANN. § 78-12-29(4),(5) (1953). Note, however, that Utah provides a two-year limitation for actions brought against peace officers for injuries caused in their official capacity. UTAH CODE ANN. § 78-12-28(1) (1953). New Mexico does not provide a one-year limitation for intentional torts. Both Colorado and Wyoming provide at least a two-year limitation for actions based on liabilities created by federal statute, *see* COLO. REV. STAT. § 13-80-106 (1973); WYO. STAT. § 1-3-115 (1977), although under a pure direct analogy approach those statutes would be irrelevant. *Cf. supra* notes 106-08 and accompanying text (criticizing Tenth Circuit for failing to analogize claim to its particularized state analogue).

135. *See, e.g.*, Garmon v. Faust, 668 F.2d 400 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982).

often arises in cases based on the wrongful conduct of law enforcement officers.

The Tenth Circuit has never addressed the issue of whether fragmentation of a federal civil rights claim is consistent with the policy of the Civil Rights Acts. The direct analogy approach would require that "each aspect of the complaint . . . be given separate statute of limitations treatment depending on the nature of the specific act or acts complained of."[136] The District of Columbia Circuit recently followed this approach, characterizing each of the plaintiff's allegations separately and then applying the statute of limitations for the analogous common law action.[137] This resulted in a different limitation period for the seizure and conversion, false-arrest, and assault components of the claim.[138] It is questionable whether the federal policy behind the civil rights statutes is promoted by dividing a claim for the violation of constitutional rights into components according to their common law counterparts.[139]

4. Compatibility of the Direct Analogy Approach with the Policies of the Civil Rights Acts

Another policy question which the Tenth Circuit has not adequately addressed is whether the very method of drawing an analogy between the deprivation of a civil right and a common law tort or contract claim is consistent with the purpose of the civil rights laws. *Childers* observed that "[s]tate legislatures do not devise their limitations period with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies."[140] While this statement is particularly apt in a situation like that of *Childers*, where the defendant argued for application of the exceptionally short limitation period provided in a state tort claims act, the rationale could easily extend to other instances in which specific state statutes of limitations do not adequately reflect the interests protected by federal civil rights statutes.

Rather than directly confront this problem, the Tenth Circuit has evaded the issue by rationalizing its rejection of analogies to certain state causes of action. For example, in *Clulow* the court was apparently convinced that Oklahoma's one-year limitations period for intentional torts[141] was too short in light of the purposes of section 1983. The court resolved this conflict by concluding that the plaintiff's claim, which arose from his involuntary

136. Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 901 (3d Cir. 1977) *cited in Zuniga*, 580 F.2d at 383.

137. McClam v. Barry, 697 F.2d 366 (D.C. Cir. 1983).

138. *Id.* at 370.

139. In this regard, the Ninth Circuit has declared:

> Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several differing periods of limitation applicable to each state-created right were applied to the single federal cause of action.

Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962).

140. 676 F.2d at 1342 (quoting Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977)).

141. OKLA. STAT. tit. 12, § 95 para. 4 (1981).

commitment to a mental institution, was not comparable to the tort of false imprisonment because the analogy was too "loose."[142] The ultimate policy consideration which must be examined, however, is whether common law tort and contract actions are indeed comparable to civil rights violations.[143]

In rejecting the limitations of Oklahoma's state tort claims act, *Childers* quoted Justice Harlan's famous statement: "[A] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."[144] In a similar vein, the Eighth Circuit has rejected the tort analogy because it "unduly cramps the significance of section 1983 as a broad, statutory remedy."[145] The Seventh Circuit has also held that the analogy approach is inappropriate because of the "fundamental differences between a civil rights action and a common law tort."[146] Aside from the practical difficulties in finding a common law analogy for some civil rights claims, such as those in *Spiegel* involving the violation of first amendment rights, it is clear that serious doubts exist as to whether the very process of comparing a civil rights claim to a common law action is compatible with the spirit of the civil rights statutes.[147]

### 5. Compatibility of the Analogy Approach with the Policies of Statutes of Limitations

In addition to policy considerations relating specifically to the Civil Rights Acts, there are pervasive social policies implicated by statutes of limitation. The Supreme Court stated in *Board of Regents v. Tomanio*[148] that "[s]tatutes of limitations are not simply technicalities. . . . [t]hey have long been respected as fundamental to a well-ordered judicial system."[149] The Court went on to observe that state statutes of limitation serve two primary purposes. First, they represent a legislative judgment about the point at which delay in bringing a claim will impair the accuracy of the fact-finding process.[150] Second, they prevent undue delay in bringing claims, thereby

142. *See* 700 F.2d at 1300.

143. *Zuniga* recognized that there are differences between a civil rights claim and a tort or contract action, but concluded that these differences did not preclude application of the direct analogy approach. 580 F.2d at 386.

144. Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). *See* 676 F.2d at 1343.

145. Garmon v. Foust, 668 F.2d 400, 406 (8th Cir.) (en banc), *cert. denied*, 456 U.S. 998 (1982).

146. Beard v. Robinson, 563 F.2d 331 (7th Cir.), *cert. denied*, 438 U.S. 907 (1977).

147. This view is not supported by Supreme Court cases. The Court has stated that there is nothing peculiar to civil rights actions that would justify special reluctance in applying state law. Johnson v. Railway Express Agency, 421 U.S. 454, 464 (1975). Despite this statement, the Supreme Court has continually refused to rule on questions involving the choice of an applicable statute of limitations in civil rights actions, leaving the resolution of the issue to the discretion of the circuit courts. *See supra* notes 7-9 and accompanying text.

148. 446 U.S. 478 (1980).

149. *Id.* at 487.

150. *Id.* The accuracy of the fact-finding process is impaired because testimony becomes increasingly unreliable as time passes. *Id.*

settling expectations and preventing litigation of stale claims.[151]

Several circuit courts have addressed the relevance of the evidentiary problem in selecting the appropriate statute of limitations in a civil rights action. For example, the Third Circuit noted that because a section 1981 violation typically involves documentary proof and a section 1982 claim depends heavily on statistical evidence, a longer statute of limitations is less likely to impede the proof of facts in section 1981 actions.[152] In contrast, the District of Columbia Circuit has declared that in a civil rights suit against police officers there are no unique aspects which would make general judicial policies inapplicable to civil rights actions.[153]

The Tenth Circuit has never discussed the relationship between the statute of limitation in a particular civil rights action and the type of evidence necessary to prove the allegations of the complaint. Nor has the Tenth Circuit examined the possibility, suggested by the Third Circuit, that evidentiary considerations may require a different standard for determining a section 1981 or section 1982 statute of limitations than would be required for a section 1983 claim.[154]

The second purpose of statutes of limitation is to protect defendants from the burden of defending against stale claims and to promote finality and order in the judicial system.[155] It has also been suggested that statutes of limitations benefit plaintiffs by providing "a sure knowledge of the time after which a suit would be futile."[156] One commentator has observed that in jurisdictions which have adopted the direct analogy approach the uncertainty regarding the applicable statute of limitations in civil rights actions has served to encourage plaintiffs to bring suits which might not otherwise be brought and to appeal adverse decisions.[157] A prospective plaintiff could be advised to litigate a claim if there is any conceivable statute of limitation under which his suit would be considered timely. Because the Tenth Circuit standard is so amorphous, there is always a possibility that a claim will not be barred if the limitation period has not run for some tort or contract action arguably comparable to the plaintiff's civil rights claim.[158] Similarly, litigants are encouraged to appeal, due to the chance that the Tenth Circuit

151. *See id.*

152. Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894, 903 n.26 (3d Cir. 1977).

153. *See* McClam v. Barry, 697 F.2d 366 (D.C. Cir. 1983).

154. *See supra* note 149 and accompanying text.

155. United States v. Oregon Lumber Co., 260 U.S. 290 (1922). *See also Tomanio*, 446 U.S. at 487.

156. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1186 (1950).

157. Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 ARIZ. ST. L. J. 97, 112 n.116.

158. An additional source of confusion is the fact that the Tenth Circuit rarely provides an unequivocal statement of the analogy which is drawn between the state action and the civil rights suit. This lack of precision is typified by the court's statement in *Shah*: *"Zuniga* appropriately defines a section 1981 claim for discriminatory discharge from employment as having the elements of both a contract and a tort claim. . . . [f]urthermore, the cause of action can clearly be construed as one based upon a liability created by statute." 627 F.2d at 1059. The court in *Shah* ultimately applied the Oklahoma statute applicable to contract actions and actions upon a liability created by statute, but never indicated which of these provided the appropriate analogy with the civil rights claim. *Id.*

might disagree with the trial court's characterization of most analogous action under state law. The *Jones* decision is illustrative of this situation.[159] Under the *Zuniga* approach, then, litigants can never be certain whether or not the limitation has expired on a particular claim because one cannot predict which analogy the Tenth Circuit will deem most appropriate.

## IV. CONCLUSION

*Zuniga*'s direct analogy approach allows greater flexibility in determining whether an action is barred than does the uniform analogy approach. *Shah* requires a court to apply the longer limitation when a substantial question exists over which state statute applies.[160] This method seems to weigh in favor of protecting the interests of plaintiffs who may have valid claims rather than the interests of defendants in having to defend against stale claims.[161] The danger of this method, however, is that a court might—either consciously or unconsciously—manipulate the statute of limitations according to its evaluation of the merits of a claim.

Additionally, although the Tenth Circuit has ostensibly adopted the direct analogy approach for determining the applicable statute of limitations in civil rights cases, the court's inconsistent application of this standard has led to a confusing line of precedent.[162] This confusion has produced an intolerable situation in which civil rights litigants have no meaningful grounds for determining whether or not an action is barred by the statute of limitations. The situation has been further complicated by state court decisions in Kansas, and New Mexico, which will force the Tenth Circuit to decide whether to accept a state's designation of the appropriate statute of limitations in certain civil rights cases as binding on the federal courts.[163]

The optimal solution to this problem would be a congressional enactment[164] providing a uniform statute of limitations for all civil rights actions.[165] Absent any legislative action, and in view of the Supreme Court's refusal to set a standard in this area, the responsibility for developing reasonable guidelines rests with the circuit courts.

After a period of inconsistent opinions, both the Seventh and Eighth Circuits decided that the uniform approach is the most compatible with the policies of the civil rights statutes.[166] The Tenth Circuit, which has never

159. *See supra* notes 66-72 and accompanying text.

160. 627 F.2d at 1059.

161. *See* Johnson v. Railway Express Agency, 421 U.S. 454, 463-64 (1975).

162. *See supra* notes 100-10 and accompanying text.

163. *See supra* notes 113-28 and accompanying text.

164. Precedent for congressional action is found in the antitrust area, where the federal courts had traditionally applied state statutes of limitations. *E.g.*, Englander Motors Inc. v. Ford Motor Co., 293 F.2d 802, 804 (6th Cir. 1961). In 1955, Congress enacted a four-year limitation period to govern all antitrust actions. *See* Pub. L. No. 138, 69 Stat. 283 (1955) (codified as amended at 15 U.S.C. § 15b (1982).

165. In this regard, one commentator has stated: "Congress should enact at once a period of limitation to make uniform throughout the country the time when suits can be brought under § 1983." C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS: CIVIL PRACTICE § 241 (2d ed. 1980).

166. *See* Garmon v. Foust, 668 F.2d 400 (8th Cir.) (en banc), *cert. denied* 456 U.S. 998 (1982); Beard v. Robinson, 563 F.2d 331 (7th Cir.), *cert. denied*, 438 U.S. 907 (1977).

adequately addressed these policy considerations, should follow these circuits[167] and abandon the direct analogy approach, which has become a source of uncertainty and confusion.[168]

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167. An authority on civil rights actions has observed: "Inasmuch as tort principles do not and should not invariably determine 1983 liability in other areas, *Beard* represents the better rule." NAHMOD, *supra* note 115, at 128.

168. In a decision received after this issue went to press, the Tenth Circuit adopted the uniform analogy approach for section 1983 actions. Henceforth, those actions will be subject to the statute of limitations provided for injuries to personal rights. Garcia v. Wilson, No. 83-1017, slip op. at 27 (10th Cir Mar. 30, 1984).

# COMMERCIAL LAW

## OVERVIEW

Once again this year, most Tenth Circuit commercial law decisions addressed procedural and substantive areas of bankruptcy. There was also an unusual case in which the Tenth Circuit reinforced the notion that an Indian tribe is on the same plane of sovereignty as a governmental entity and thus not subject to suit absent tribal consent. In that decision, the court determined specifically that without tribal consent an entity established by a tribe cannot obligate the tribe for the entity's debts. Additionally, the Tenth Circuit considered questions arising under the Uniform Commercial Code concerning security interests, parol evidence, and damages.

## I. BANKRUPTCY PETITIONER'S RIGHT TO AMEND EXEMPT PROPERTY LIST

In *Redmond v. Tuttle*,[1] the Tenth Circuit considered two bankruptcy issues. The first was whether bankruptcy petitioners have an absolute right to amend their exempt property schedules when new assets are discovered before the bankruptcy is closed.[2] The second issue was whether, given petitioners' right to amend, the exemption can be denied upon timely objection by the bankruptcy trustee.[3]

The Tuttles filed a voluntary bankruptcy petition which included a schedule of federal exemptions.[4] More than two months later the bankruptcy trustee learned that the Tuttles owned a checking account which had not been declared as an asset of their estate and which had not been included on their exemption schedule.[5] Following an objection to discharge based on the allegedly fraudulent concealment of the checking account, the Tuttles requested that the proceeds from the account be added to their schedule of exemptions, contending that they had been unaware of the account's existence.[6] The trustee objected to the amendment because the Tuttles had not challenged the exemption schedule within fifteen days from the date of the creditors' meeting, as required by the local bankruptcy rules.[7]

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1. 698 F.2d 414 (10th Cir. 1983).

2. *Id.* at 416.

3. *Id.*

4. *Id.* at 415. 11 U.S.C. § 522 (1982) sets forth the categories and amounts of property which may be exempted from the bankruptcy estate.

5. The First National Bank of Quinter, Kansas notified the bankruptcy trustee of the existence of a joint personal checking account owned by the Tuttles which had a $4,563.80 balance. 698 F.2d at 415.

6. *In re* Tuttle, 15 B.R. 14, 15 (Bankr. D. Kan.), *aff'd*, 16 B.R. 470 (D. Kan. 1981), *aff'd in part*, 698 F. 2d 414 (10th Cir. 1983). *See* 11 U.S.C. § 727(a)(2) (1982) (barring discharge where a debtor intentionally conceals assets).

7. 15 B.R. at 17. 11 U.S.C. § 341(a) (1982) states that "[w]ithin a reasonable time after the order for relief in a case under this title, there shall be a meeting of creditors." The local rule required objections to the exemption schedule to be filed within fifteen days of the creditors' meeting held pursuant to section 341(a). 15 B.R. at 18.

The bankruptcy court disallowed the amendment, asserting three bases for its action. First, the Tuttles had not complied with the relevant local rule.[8] Second, the requested amendment could not be permitted as an exercise of discretion because interested parties (the creditors) had relied on the finality of the exemption schedule, as evidenced by the lack of creditor objections prior to expiration of the fifteen day period.[9] Finally, the bankruptcy court held that the voluntary transfer of the money into the bank account prevented the petitioners from using the statutory provision[10] which permits an exemption when the trustee recovers property which has been involuntarily transferred from the bankrupt's estate.[11] The district court affirmed,[12] reiterating the need for finality of the exemption list and concluding that the bankruptcy court's denial of a discretionary amendment was not unreasonable in light of the Tuttles' inexcusable neglect in failing to ascertain the existence of the bank account.[13]

The Tenth Circuit disagreed with the lower courts concerning the right to amend the exemption schedule,[14] but refused to allow the exemption itself.[15] In upholding the Tuttles' right to amend the court followed Rule 110 of the Federal Rules of Bankruptcy Procedure,[16] which permits amendment of the voluntary petition "as a matter of course at any time before the case is closed. . . ."[17] The court noted that permitting amendments as a matter of right would not prejudice creditors, because under Rule 403[18] any party in interest retained the right to object to the amendment within fifteen days.[19]

On the question of whether the exemption itself should be allowed, the Tenth Circuit noted that the exemption was sought on the basis that the money had been involuntarily transferred from the estate.[20] The debtors argued that the transfers were involuntary because the bank had independently placed funds in a checking account which the petitioners thought they had closed.[21] Because the debtors had included no deposit instructions on the checks, however, the court held that responsibility for the deposits ultimately rested with the debtors.[22] The funds were therefore in the bank account as a result of voluntary transfers out of the debtor's estate, and such

8. 15 B.R. at 17.

9. *Id.* at 18.

10. 11 U.S.C. § 522(g) (1982).

11. 15 B.R. at 19-20. The bankruptcy court ruled that although the Tuttles had intended to deposit the money in their personal checking account, the act of voluntarily depositing the money precluded a finding of involuntary transfer even though the bank, on its own decision, credited the money to a business account. *Id.* at 20.

12. *In re* Tuttle, 16 B.R. 470 (D. Kan. 1981), *aff'd in part*, 698 F.2d 414 (10th Cir. 1983).

13. 16 B.R. at 472.

14. Redmond v. Tuttle, 698 F.2d 414, 417 (10th Cir. 1983).

15. *Id.* at 417-18.

16. FED. RULE BANKR. P. 110. The Bankruptcy Rules were revised effective August 1, 1983. Rule 110 was replaced by Rule 1009.

17. FED. R. BANKR. P. 110.

18. FED. R. BANKR. P. 403. Rule 403 has been replaced by Rule 4003.

19. 698 F.2d at 417.

20. *Id. See* 11 U.S.C. § 522(g)(1) (1982).

21. 698 F.2d at 417.

22. *Id.* at 418.

funds were not exempt.[23]

The result in *Tuttle* is sound law. It is reasonable to allow an amendment by right, because an automatic exemption does not accompany the amendment. Questionable transfers may be objected to under Rule 403, with hearings required when there is a dispute as to the propriety of granting an exemption.

## II. GOOD FAITH PURCHASER STATUS FOR AFFILIATES OF DEBTOR'S GENERAL PARTNER

In *Tompkins v. Frey (In re Bel Air Associates, Ltd.)*,[24] the Tenth Circuit determined the conditions under which Rule 805[25] good faith purchaser status can be accorded to an affiliate of a debtor's general partner.[26]

Bel Air Associates, Ltd. (Bel Air) was a limited partnership organized by Frey, Tompkins, and others to purchase and operate an apartment complex owned by Leroy Properties and Development Corporation (Leroy) and managed by PM & M Company (PM & M), a wholly-owned subsidiary of Leroy.[27] The partners agreed that Frey would be the general partner of Bel Air and that PM & M would manage the purchased complex.[28] Prior to completing the sale, Frey revealed his controlling interests in PM & M and Leroy to Tompkins and the other limited partners.[29] The limited partnership nonetheless purchased the apartment complex, assuming the first mortgage, paying some cash, and giving Leroy a second mortgage as security for the remainder of the purchase price.[30]

Subsequently, because of financial failure, Frey, in his capacity as general partner of Bel Air, filed a bankruptcy petition listing Leroy and PM & M as the principal creditors.[31] The approved reorganization plan required selling the complex by auction and paying the creditors with the proceeds.[32] Leroy submitted the bid with highest present value. The bid included assumption of the mortgage, satisfaction of Bel Air's debts to Leroy and PM & M, and payment of Bel Air's administrative expenses.[33] Tompkins, a limited partner of Bel Air, objected to the plan and requested that the bankruptcy court stay any further proceedings, including the sale of the property to Le-

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23. *Id.*

24. 706 F.2d 301 (10th Cir. 1983).

25. FED. R. BANKR. P. 805. This rule stated in pertinent part:

> Unless an order approving a sale of property or issuance of a certificate of indebtedness is stayed pending appeal, the sale to a good faith purchaser or the issuance of a certificate to a good faith holder shall not be affected by the reversal or modification of such order on appeal, whether or not the purchaser or holder knows of the pendency of the appeal.

*Id.*

26. *See* 706 F.2d at 305-06 & n.17.

27. *Id.* at 303.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 303-04.

32. *Id.* at 304.

33. *Id.*

roy.[34] The bankruptcy court granted the stay, subject to Tompkin's payment of a supersedeas bond.[35] When Tompkins failed to post the bond the bankruptcy court allowed the reorganization plan to proceed, and the property was sold to Leroy as the highest bidder.[36]

When Tompkins appealed the sale the district court held that the appeal was moot because Leroy's status as a good faith purchaser precluded setting aside the sale.[37] The issues addressed by the Tenth Circuit were whether Leroy could be a good faith purchaser in light of either the make-up of its bid or Frey's simultaneous interests in Leroy and Bel Air.[38] In holding that Leroy was a good faith purchaser, the Tenth Circuit adopted a recognized two-prong test. A good faith purchaser is one who buys in good faith and who gives value.[39] The court found that Leroy's purchase satisfied both conditions.[40] Leroy had clearly given value; because its claims against Bel Air were valid, and because Leroy's use of a present value analysis in valuing its bid was not misleading, Leroy had acted in good faith.[41]

The next argument Tompkins asserted was that Frey's status as a fiduciary of Bel Air should prevent his direct purchase of the apartment complex, and that a similar restraint should be imposed on Leroy because it was Frey's controlled corporation.[42] The court held that, even assuming that Leroy was Frey's alter ego,[43] Leroy was a secured creditor of Bel Air, and secured creditors had the right to bid for collateral at a bankruptcy sale.[44] While a different result might have been reached if Frey had concealed his interest in Leroy,[45] full disclosure of that interest prior to Leroy's becoming a secured creditor entitled Leroy to assert all rights inuring to secured creditors.[46]

*Tompkins* continues the recent trend of more favorable treatment to creditors in the area of bankruptcy litigation.[47] Because it is now settled in the Tenth Circuit that transactions involving affiliated secured creditors are not necessarily excluded from the good faith purchaser protections, *Tompkins* may encourage the extension of credit.

## III. BANKRUPTCY COURT JURISDICTION

The Tenth Circuit case of *General Electric Credit Corp. v. Montgomery Mall*

34. *Id.*
35. *Id. See* FED. R. BANKR. P. 805, providing that a sale may take place to a good faith purchaser unless there is a stay of the action.
36. 706 F.2d at 304.
37. *Id.* If Leroy had not been a good faith purchaser Rule 805 would have been inapplicable, and the sale could have been modified or voided.
38. *See* 706 F.2d at 305-06.
39. *Id.* at 305. The Tenth Circuit had not previously defined the elements establishing a good faith purchaser in bankruptcy cases. *See id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 306.
44. *Id.*
45. *See id.* at 306 n.17.
46. *Id.* at 306.
47. *See* Mathews, *The Scope of Claims Under the Bankruptcy Code*, 57 AM. BANKR. L.J. 339 (1983).

*Limited Partnership (In re Montgomery Mall Limited Partnership)*[48] presented two issues concerning the limits of bankruptcy court jurisdiction. The first issue addressed was whether bankruptcy courts had jurisdiction to grant summary judgment in state foreclosure proceedings, or whether bankruptcy jurisdiction was limited to full hearings.[49] The second issue addressed involved the effect of the bankruptcy judge's failure to comply with the notice requirements incident to a motion for summary judgment.[50]

Montgomery Plaza Shopping Center was owned by Montgomery Mall, a limited partnership.[51] The partnership owed a debt to General Electric Credit Corp. (GECC), which was secured by mortgages and an assignment of leases and rent payments.[52] When the partnership defaulted, GECC filed a foreclosure action in state court and moved for summary judgment.[53] Prior to a hearing on the motion the partnership filed a petition in bankruptcy, thereby staying the foreclosure action.[54] GECC then moved the bankruptcy court for emergency relief under section 362(f) of the Bankruptcy Code,[55] requesting that the bankruptcy court remove the automatic stay[56] imposed on the foreclosure proceedings.[57] The next day the bankruptcy judge granted GECC's motion, terminated the stay of the bankruptcy proceedings to the extent of allowing GECC to foreclose, and entered summary judgment on the foreclosure action.[58] At a rehearing several weeks later the partnership objected to the summary judgment primarily because the plaintiffs had not provided the notice required by Federal Rule of Civil Procedure 56(c).[59] The district court, apparently rejecting this argument, reaffirmed its grant of summary judgment.[60]

As indicated above, the partnership's first argument on appeal was that section 362(f) did not invest the bankruptcy court with jurisdiction to grant the requested summary judgment.[61] The Tenth Circuit resolved this contention by examining the temporal relationship between the bankruptcy court's action and the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Oil Co*.[62]

At the time *Northern Pipeline* was decided, *Montgomery Mall* was pending

48. 704 F.2d 1173 (10th Cir.), *cert. denied*, 104 S. Ct. 108 (1983).
49. *See id.* at 1175.
50. *See id.* at 1176.
51. *Id.* at 1173.
52. *Id.* at 1173-74.
53. *Id.* at 1174.
54. *Id.*
55. 11 U.S.C. § 362(f) (1982) This section provides:
The court, without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.
*Id.*
56. *See* 11 U.S.C. § 362(a) (1982).
57. 704 F.2d at 1174.
58. *Id.*
59. FED. R. CIV. P. 56(c) provides in part that a summary judgment motion "shall be served at least 10 days before the time fixed for the hearing."
60. 704 F.2d at 1174.
61. *Id.* at 1175.
62. 458 U.S. 50 (1982).

appeal.[63] *Northern Pipeline* deemed unconstitutional the broad grant of jurisdiction delegated to bankruptcy judges, at least insofar as the bankruptcy court exercised jurisdiction over suits between two private litigants involving rights created by state law.[64] The Tenth Circuit pointed out that *Northern Pipeline*'s narrowing of bankruptcy court jurisdiction was prospective only.[65] Accordingly, cases on appeal when *Northern Pipeline* was decided on June 28, 1982, such as *Montgomery Mall*, were unaffected by the *Northern Pipeline* holding.[66] Thus, the scope of jurisdiction for such cases was determined by reference to Congress' original intent.[67] The Tenth Circuit held that Congress had intended bankruptcy courts to have the power to grant summary judgments in state foreclosure suits pursuant to section 362(f),[68] and the bankruptcy court had therefore properly exercised its jurisdiction in *Montgomery Mall*.[69]

The Tenth Circuit then rejected the partnership's lack of notice objection to the summary judgment, holding that the partnership's knowledge of the stayed state summary judgment proceedings should have alerted it to the probability that GECC would request summary judgment in the bankruptcy court.[70] Because the partnership could therefore show no prejudice flowing from the lack of the statutorily required notice, reversible error had not been committed.[71] Supplementing its position, the court pointed to case law holding that removing a case from state court to federal court does not affect the state court's procedural schedule.[72] The court read this case law to implicitly recognize that notice given in state court proceedings provides notice in proceedings removed to federal court.[73]

The last issue determined by the Tenth Circuit in *Montgomery Mall* was whether the bankruptcy court's grant of emergency relief to GECC under section 362(f) was substantively correct.[74] The court concluded that because emergency relief was necessary to prevent irreparable damage to GECC, the bankruptcy judge had acted properly.[75]

*Montgomery Mall* clarifies the scope of bankruptcy court jurisdiction both before and after the *Northern Pipeline* case. The case also points out that even after *Northern Pipeline*, ten days notice prior to a summary judgment hearing will not be required in all circumstances.

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63. *See* 704 F.2d at 1175.

64. *See* 458 U.S. at 69-70 (resolution of private rights disputes fundamental attribute of judicial power); 458 U.S. at 90-91 (Rehnquist, J., concurring) (bankruptcy court jurisdiction unconstitutional insofar as it reaches state law disputes between two private litigants).

65. 704 F.2d at 1175 (citing *Northern Pipeline*, 458 U.S. at 88).

66. 704 F.2d at 1175.

67. *Id.*

68. *See id.*

69. *Id.*

70. *Id.*

71. *Id.* (citing Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 391 (7th Cir.), *cert. denied*, 454 U.S. 838 (1981); Hoopes v. Equifax, Inc., 611 F.2d 134, 136 (6th Cir. 1979)).

72. *See* 704 F.2d at 1176.

73. *Id.*

74. *Id.*

75. *Id.*

## IV. TRIBAL ENTITY AS SEPARATE FROM TRIBE

In *Navajo Tribe v. Bank of New Mexico*,[76] the Tenth Circuit analyzed the circumstances in which an entity established by an Indian tribe can obligate the tribe for the entity's debts. The entity, Navajo Housing and Development Enterprise (NHDE), was created by the Navajo Tribe (Tribe) in conformance with tribal law.[77] When NHDE failed to repay promissory notes for money borrowed from the Bank of New Mexico (Bank), the Bank offset the amount due against a certificate of deposit held in the name of the Tribe.[78] The Tribe challenged this action, arguing that NHDE was distinct from the Tribe and that therefore the Tribe could not be charged with NHDE's debts.[79] The district court agreed and ordered return of the offset.[80] On appeal, the Bank argued that the Tribe lacked power to create a semi-governmental entity distinct from the Tribe, and that even assuming that capacity the tribe's conduct estopped it from asserting NHDE's separateness.[81]

Recognizing that the Tribe, as a sovereign, has the power to create a semi-governmental entity,[82] the court noted that the relevant inquiry was whether the Tribe had created an independent entity.[83] Tribal control of NHDE was not determinative in characterizing NHDE's separate status.[84] The inquiry used by the court essentially assumed that the tribe had created a distinct entity, and then analyzed the extent to which the entity could be considered separate without impinging on the sovereignty of the government creating the ostensibly distinct entity.[85] Because tribal sovereignty was not threatened by holding NHDE responsible for its own debts, NHDE was an independent enterprise.[86]

The court also noted two other factors militating towards NHDE's separateness. *White Mountain Apache Indian Tribe v. Shelley*[87] was cited for the proposition that "the right to sue a tribal enterprise was exclusively within the inherent power of the Tribe to establish."[88] Thus, to impute a breach in tribal immunity in the absence of express consent would unreasonably interfere with tribal sovereignty.[89] The Tenth Circuit then surveyed a number of cases recognizing the notion that tribes and tribal entities are to be treated separately where tribal sovereignty is not in issue.[90]

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76. 700 F.2d 1285 (10th Cir. 1983).
77. *Id.* at 1286.
78. *Id.* at 1286-87.
79. *Id.* at 1287.
80. Navajo Tribe v. Bank of New Mexico, 556 F. Supp. 1 (D.N.M. 1980), *aff'd*, 700 F.2d 1285 (10th Cir. 1983).
81. 700 F.2d at 1287.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 1288.
87. 107 Ariz. 4, 480 P.2d 654 (1971).
88. 700 F.2d at 1288.
89. *Id.*
90. *Id.* (citing Navajo Tribal Util. Auth. v. Arizona Dep't of Revenue, 608 F.2d 1228 (9th Cir. 1979); R.C. Hedreen Co. v. Crow Tribal Hous. Auth., 521 F. Supp. 599 (D. Mont. 1981);

From these premises the circuit court concluded that the Tribe could not be liable for NHDE's debts unless a threat to tribal sovereignty existed or the Tribe in creating NHDE had intended to assume its debts; any other treatment would nullify the power of the tribal government to create a governmental corporation.[91] Because neither of these conditions were present, the Tribe could not be held liable through an organizational analysis.[92]

The court also rejected the argument that NHDE could be deemed the alter ego of the Tribe due to the Tribe's conduct in NHDE's dealings with the Bank.[93] Examination of the record revealed no affirmative conduct by the Tribe which would lead the bank to conclude that NHDE was not a separate and distinct entity.[94] In fact, the record indicated that the Bank had actual knowledge that the Tribe did not intend to honor NHDE's debts.[95] Thus, there was no right to charge the Tribe's account with NHDE's debts. Such a right exists only where there is a creditor-debtor relationship, which was not present between the Tribe and the Bank with respect to NHDE's debts.[96]

The result of this case illustrates to creditors that if a tribal entity exists, "piercing its veil" and looking to the tribe for payment of the entity's obligations will meet significant judicial resistance. Hence, only the assets of the entity itself should be relied on in making a loan determination.

## V. UNIFORM COMMERCIAL CODE DECISIONS

### A. *Lease as Security Interest*

*Adelman v. General Motors Acceptance Corp. (In re Tulsa Port Warehouse Co., Inc.)*[97] arose out of a lease of automobiles to Tulsa Port Warehouse, a firm which later filed a petition in bankruptcy.[98] General Motors Acceptance Corporation (GMAC), the assignee of the leases, claimed a priority interest in the cars.[99] The trustee in bankruptcy objected, claiming that the leases were actually unperfected security agreements, and that GMAC therefore lacked a priority interest.[100] If the purported lease was actually a security interest, the effect would have been subordination of GMAC's claims be-

Namekagon Dev. Co., Inc. v. Bois Forte Reservation Hous. Auth., 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975)).

91. 700 F.2d at 1288.

92. *See id.*

93. *Id.* at 1289.

94. *Id.* at 1288.

95. *Id.* The court pointed out that two senior vice-presidents of the Bank were on NHDE's board, and also found that the Bank knew it had the ability to procure financial guarantees from the Tribe, but took no steps to secure such guarantees. *Id.* at 1288 & n.2. The district court had held that the Bank's knowledge of NHDE's separate nature estopped the bank from denying NHDE's separate existence, in a reverse application of the "corporation-by-estoppel" doctrine. Navajo Tribe v. Bank of New Mexico, 556 F. Supp. 1, 3 (D.N.M. 1980), *aff'd*, 700 F.2d 1285 (10th Cir. 1983).

96. 700 F.2d at 1289. Because NHDE was separate from the Tribe, the creditor-debtor relationship was between the enterprise and the Bank.

97. 690 F.2d 809 (10th Cir. 1982).

98. *Id.* at 810.

99. *Id.*

100. *Id.*

cause its interest was admittedly unperfected.[101]

The bankruptcy court and the district court both ruled in favor of the trustee and concluded that the leases in the instant case constituted security interests.[102] The Tenth Circuit affirmed, relying in large measure on *Steele v. Gebetsberger (In re Fashion Optical, Ltd.)*,[103] a Tenth Circuit decision on the same general question decided just one year earlier. In *Fashion Optical* the court stated that even when there was no purchase option, a lease would be deemed one intended as security "if the facts otherwise expose economic realities tending to confirm that a secured transfer of ownership is afoot."[104] *Tulsa Port* pointed to a number of factors which other courts have used in determining the economic reality of a purported lease. These factors included: 1) whether the lessee obtained an equity interest; 2) whether the lessee was required to provide insurance with benefits running to the lessor; 3) whether the lessee paid sales tax; 4) whether maintenance and annual taxes were the lessee's responsibility; and 5) whether the lessee bore the risk of loss.[105]

Because nearly all of the factors were present in Tulsa Port's leases, the lessee held all incidents of ownership save legal title, and the leases constituted secured transactions.[106] The court added that there was no economic difference between these leases and secured transfers of property, and concluded that a buyer and seller should not be allowed to " 'masquerad[e] their secured installment sale as a 'lease', thereby placing it beyond the reach of the UCC provisions governing secured transactions.' "[107]

*Tulsa Port* reiterates that courts will look beyond the form of a lease agreement to determine whether the provisions of the contract reflect the parties' underlying objective of effecting a sale. The case also outlines the criteria which should be taken into account when one wishes to enter into a true lease in order to avoid a later determination that the lease is a secured transaction.

### B. *Parol Evidence and Damages*

In *United States ex rel. Federal Corp. v. Commercial Mechanical Contractors*,[108] the seller, Federal, had submitted a bid to supply underground fuel storage tanks to the buyer, Commercial Mechanical Contractors, which was to use these tanks in conjunction with a contract with the United States Army.[109] Included in the seller's quotation form was an exculpatory clause which stated that the seller would not be liable for any delays arising from causes beyond its control.[110] This quotation form, along with a letter amendment

101. *Id.*
102. *Id.*
103. 653 F.2d 1385 (10th Cir. 1981).
104. *Id.* at 1389.
105. 690 F.2d at 811.
106. *Id.* at 811-12.
107. *Id.* (quoting *Fashion Optical*, 653 F.2d at 1388).
108. 707 F.2d 1124 (10th Cir. 1982).
109. *Id.* at 1126.
110. *Id.*

and an invoice, were the only documents involved in the sales transaction.[111]

Trial testimony supported the conclusion that Commercial would not have accepted Federal's bid if Federal had not assured Commercial that the tanks would be delivered within a specified time.[112] The tanks were delivered late, and as a consequence Commercial was required to incur added expenses for maintenance and excavation of the holes prepared for the tanks.[113] A jury awarded Commercial both actual and consequential damages for Federal's breach of contract.[114]

The Tenth Circuit considered three issues in this case. The first issue was whether parol evidence concerning the essentiality of timely delivery was correctly admitted in the trial court, or whether the contract, the amendment, and the invoice constituted the entire agreement of the parties.[115] The court noted that the posture of Commercial's claim[116] made it unclear whether federal or state law controlled construction of the contested contract.[117] Finding that there was no conflict between applicable state law and general principles of contract law,[118] the Court resolved the parol evidence issue by reference to the Uniform Commercial Code (UCC).[119]

The court began its analysis by noting that the UCC recognizes contracts which include both oral and written terms.[120] Given the incomplete nature of the extant written terms, the trial court's determination to admit evidence of oral terms was permissible.[121] Because the record supported a determination that the parties had intended to include a term that "time was of the essence," the jury could have properly found that Federal had breached this contractual duty.[122]

The second issue was whether the seller was estopped from asserting the exculpatory clause as a defense to late performance.[123] The Tenth Circuit found that the jury could have reasonably concluded that Federal had deliberately misrepresented its ability to effect timely delivery.[124] Because the

111. *Id.*

112. *Id.*

113. *Id.* Because the tanks were late, the walls of the holes began to collapse and had to be re-excavated. Additionally, overhead costs continued to accumulate because of the extended time needed for completion of the contract. Both of these complications resulted in added expense for Commercial. *Id.*

114. *Id.* at 1125-26.

115. *See id.* at 1126.

116. Commercial's contract claim was asserted in a proceeding Federal had brought pursuant to the Miller Act, 40 U.S.C. §§ 270a-270f (1982). The Miller Act provides a remedy for persons who have not been paid for materials used in a public works project. *Id.* § 270b. Commercial had failed to pay Federal the entire amount due for supplying the fuel tanks. 707 F.2d at 1125.

117. 707 F.2d at 1126 n.1.

118. *Id.*

119. *See id.* at 1126-28.

120. *Id.* at 1127 (citing U.C.C. § 2-204).

121. 707 F.2d at 1127-28.

122. *Id.* at 1128.

123. *Id.* As noted, the exculpatory clause excused the seller from liability for delays beyond its control. *See supra* text accompanying note 110.

124. 707 F.2d at 1128. Commercial alleged that it had begun excavation in reliance upon Federal's representations that the tanks were in the process of being delivered. *See id.* at 1126, 1128.

elements of estoppel were otherwise supported by the record,[125] the Tenth Circuit upheld the jury's finding of estoppel.[126]

The final issue on appeal was whether the trial court had correctly recognized the elements of Commercial's damages.[127] Following the historical case of *Hadley v. Baxendale*,[128] the circuit court reaffirmed that a buyer can recover all damages which are reasonably foreseeable to the parties at the time they enter into a contract.[129] Thus, damages could include extended overhead expenses and expenses for maintenance of already excavated sites which the buyer incurred as a result of the seller's delay in completing its side of the contract.[130] Because the evidence supported the conclusion that all the contested damages were foreseeable, and were attributable to Federal's breach, the damage award was upheld.[131]

*Commercial Mechanical Contractors* seems to imply that an exculpatory clause may be used only by one who exhibits good faith in performing his part of a contract, and who does not induce reliance on timely performance and then seek to use the exculpatory clause to escape liability. This case also reaffirmed the proposition that any written contract should explicitly state that it is the full and final expression of the parties, if that is their intent. Finally, the circuit court continued the trend of including as consequential damages those damages which may be somewhat remote as long as the damages were reasonably foreseeable at the inception of the contract.

*Noelle Paige*

125. *See id.*
126. *Id.*
127. *See id.* at 1129. Specifically, Federal objected to including both Commercial's extended overhead expenses and maintenance expenses for a second hole as elements of damages. *Id.*
128. 156 Eng. Rep. 145 (1854).
129. 707 F.2d at 1129.
130. *Id.*
131. *Id.*

# CONSTITUTIONAL LAW

## OVERVIEW

During the period covered by this survey the Tenth Circuit Court of Appeals considered a wide range of issues in the area of constitutional law. This overview first analyzes the court's activity in three important areas: ballot access, freedom of speech, and justiciability of tort claims stemming from operation of nuclear facilities. Finally, there is a brief review of the court's opinions dealing with other questions of constitutional law.

## I. MINOR PARTY BALLOT ACCESS: THE TENTH CIRCUIT REJECTS STRICT SCRUTINY

In *Arutunoff v. Oklahoma State Election Board*[1] the Tenth Circuit Court of Appeals considered a constitutional challenge to those portions of Oklahoma's election act which affect ballot access by minor parties. The first portions challenged provided for decertification of previously recognized political parties whose nominees for President, Vice President, or Governor failed to receive ten percent of the votes cast.[2] Decertification denied candidates sponsored by decertified parties the automatic ballot access provided to candidates affiliated with recognized parties.[3] Additionally, the party affiliation of members of decertified parties was changed to Independent.[4] The second portion of the election act which was challenged permitted ballot access to independent candidates under requirements less stringent than those imposed on party candidates.[5]

### A. *Oklahoma's Election Act Under Fire*

In the 1980 general election, the Oklahoma Libertarian party's nominees for electors for President of the United States failed to receive the percentage of votes required for continued official recognition.[6] Members of the Libertarian party brought suit to enjoin Oklahoma election officials from decertifying the party and changing the affiliation of party members to In-

1. 687 F.2d 1375 (10th Cir. 1982), *cert. denied*, 103 S.Ct. 1892 (1983).

2. OKLA. STAT. tit. 26, § 1-109 (1981) provides: "Any recognized political party whose nominee for Governor or nominees for electors for President and Vice President fail to receive at least ten percent (10%) of the total votes cast for said offices in any General Election shall cease to be a recognized political party. . . ."

3. OKLA. STAT. ANN. tit. 26, § 1-102 (1981) provides automatic ballot position to recognized political parties complying with statutorily mandated primary procedures. *See* Craig v. Bard, 160 Okla. 34, 15 P.2d 1014 (1932) (interpreting predecessor to section 1-102).

4. OKLA. STAT. tit. 26, § 1-110 (1981) provides: "The secretary of each county election board shall . . . change to Independent the party affiliation on the registration form of each registered voter of a political party which ceases to be a recognized political party."

5. OKLA. STAT. tit. 26, § 5-112 permits independent candidates to be listed on the ballot either through presenting a petition signed by five percent of all registered voters or by simply paying a filing fee.

6. The Libertarian presidential electors gained only 1.2% of the total votes cast in the 1980 general election, far short of the required 10%. 687 F.2d at 1377. *See supra* note 2.

dependent.[7] The district court denied the plaintiffs' request for relief and dismissed the action.[8] The Tenth Circuit, over Judge Seymour's dissent, upheld the district court.[9] The Supreme Court has refused to consider the Tenth Circuit's decision.[10]

### B. *The* Arutunoff *Opinion*

The *Arutunoff* plaintiffs claimed that Oklahoma's decertification scheme unduly burdened their rights to freely cast their votes and to associate for the advancement of political beliefs, in violation of the first and fourteenth amendments. The independent candidate access requirements were challenged solely on equal protection grounds.[11] The *Arutunoff* opinion does not set forth the precise basis for plaintiffs' first and fourteenth amendment claims. While the opinion is therefore an inadequate vehicle for analyzing the court's treatment of these particularized claims, the dialogue between the court and the dissent concerning the proper standard of review does provide an opportunity for a brief analysis[12] of the methodological problems existing in this area of constitutional law.

Methodological problems stem from the fact that although the Supreme Court has written extensively on state regulation of ballot access,[13] no unequivocal standard of review has emerged from its decisions.[14] The discussion below limits itself to the standard of review issue in the context of the decertification challenge. The challenge based on easier independent candidate access is not addressed because the court properly held that controlling precedent permits disparate treatment for independent and party candidates.[15]

### C. *Differing Interpretations of Supreme Court Precedent*

The majority essentially viewed the Court's decisions as creating no fixed standard of review. Rather, the Supreme Court opinions were read as requiring the judiciary to evaluate ballot restrictions on an ad hoc/sui generis basis.[16] Restrictions judicially deemed "unduly oppressive" are struck down, with lesser restrictions permitted as a proper exercise of the

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7. 687 F.2d at 1377.

8. *Id.*

9. Arutunoff v. Oklahoma State Election Bd., 687 F.2d 1375 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1892 (1983).

10. Arutunoff v. Oklahoma State Election Bd., 103 S. Ct. 1892 (1983), *denying cert. to* 687 F.2d 1375 (10th Cir. 1982).

11. 687 F.2d at 1378.

12. For fuller discussion of Supreme Court cases dealing with ballot access, *see* Elder, *Access to the Ballot by Political Candidates*, 83 DICK. L. REV. 387 (1979); Rada, Cardwell, Friedman, *Access to the Ballot*, 13 URB. LAW. 793 (1981).

13. In chronological order the relevant cases have been: Williams v. Rhodes, 393 U.S. 23 (1968); Jenness v. Fortson, 403 U.S. 431 (1971); Bullock v. Carter, 405 U.S. 134 (1972); Lubin v. Panish, 415 U.S. 709 (1974); Storer v. Brown, 415 U.S. 767 (1974); Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); and Clements v. Fashing, 457 U.S. 957 (1982).

14. *Compare Arutunoff*, 687 F.2d at 1379 (McWilliams, J.) (Supreme Court's decisions do not reveal "hard-and-fast" rule or standard for measuring state ballot access laws) *with Arutunoff*, 687 F.2d at 1381 (Seymour, J., dissenting) (Supreme Court's decisions clearly mandate use of strict scrutiny in evaluating ballot access laws imposing more than de minimus burdens).

15. *See* 687 F.2d at 1380 (citing Storer v. Brown, 415 U.S. 724, 725 (1974)).

16. 687 F.2d at 1379.

state's interest in protecting the integrity of the electoral process.[17] This approach emphasizes the need to examine challenged election laws to determine whether, as a practical matter, the laws operate to exclude minor party ballot access.

Applying its test in *Arutunoff*, the court concluded that the Oklahoma decertification procedures did not unduly burden ballot access. The majority concluded (without reference to the record) that the requirements for continued certification were not unreasonably high, and that decertified parties could easily become recertified.[18] The fact that ballot access was easier under prior laws was deemed irrelevant; the court stated that the relevant inquiry was the effect of existing law.[19] Given the reasonableness of the burdens created by the existing laws, the plaintiffs were not entitled to relief.[20]

Judge Seymour, in dissent, disagreed with the majority's interpretation of the Supreme Court's ballot access cases. Under her reading, once a minor party established that ballot access restrictions were not de minimus a court was required to apply strict scrutiny and strike down restrictions not reflecting the least restrictive means of protecting ballot integrity.[21] Finding Oklahoma's certification/decertification framework to impose substantial burdens on minor party access (albeit without citation of evidentiary support for this conclusion), Judge Seymour easily found a less restrictive scheme in Oklahoma's previous certification procedures.[22] Hence, the required application of strict scrutiny mandated reversal of the district court's decision to deny plaintiffs their requested relief.[23]

### D. *Sources of Methodological Confusion*

The Supreme Court's first contemporary encounter with minor party ballot access restrictions came in *Williams v. Rhodes*.[24] In *Williams* the Court held that two fundamental rights were implicated by state laws affecting minor party ballot access: the right to associate for advancement of political beliefs, and the right of a qualified voter to cast his or her ballot effectively.[25] Ballot access restrictions burdening these fundamental rights could only be justified by compelling state interests.[26]

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17. *Id.* The state's interest in protecting the electoral process from fraud, voter confusion, and similar antidemocratic effects provides the basis for permitting ballot access restriction. *See, e.g.*, Bullock v. Carter, 405 U.S. 134 (1972).

18. 687 F.2d at 1379-80. Under OKLA. STAT. tit. 26, § 1-108 (1981), any non-certified party presenting a petition signed by five percent of the voters in the immediately preceding gubernatorial or presidential election must be certified.

19. 687 F.2d at 1380.

20. *Id.*

21. *Id.* at 1380-83 (Seymour, J., dissenting).

22. *Id.* at 1381. Judge Seymour found further support for her contention that the new laws were unnecessarily restrictive in the lack of evidence of ballot confusion or fraud under the prior statutory provisions. *Id.* at 1382-83.

23. *Id.* at 1383.

24. 393 U.S. 23 (1968).

25. *Id.* at 30-31.

26. *Id.* The Court did not explictly articulate a "least restrictive means" requirement in *Williams*, instead balancing the degree of restriction against the weight of the state's interest. *See id.* at 32.

*Bullock v. Carter*[27] was the first case to limit *Williams*, doing so in two ways. The first, explicit limitation was the recognition that not every ballot access restriction invoked strict scrutiny; only when meaningful restriction was present would the rigorous strict scrutiny be imposed.[28] The second, implicit limitation is found in *Bullock's* delineation of strict scrutiny methodology. Instead of defining the judicial task as an investigation into whether the legislative restrictions were the "least restrictive alternative," *Bullock* defined the inquiry as an examination of whether the challenged restrictions were "reasonably necessary" to accomplish state goals.[29] Since *Bullock*, the Court has used both a "reasonably necessary" and a "least restrictive alternative" standard to test ballot access restrictions.[30] A situation has therefore been created in which a version of "middle-tier" scrutiny (legitimate state interest combined with reasonable means) coexists with strict scrutiny (compelling state interest combined with least restrictive means).

### E. *Resolving the Confusion by Favoring Democratic Participation*

While the divergence in Supreme Court holdings may justify the *Arutunoff* majority, *Aruntunoff* clearly lies outside the spirit of the Court's ballot access opinions. The thrust of the Court's decisions has been directed towards *reducing* access requirements, with antagonism shown towards regulations increasing the numerical requirements for ballot access.[31] The Court also recently noted the honorable and vital role minor parties have played in the moral and political progress of the American polity.[32] Further, ballot access limitations impact directly on core first amendment rights of political expression, clearly justifying judicial apprehension towards state action restricting those rights.

The state in *Arutunoff* did not present even a modicum of proof that its increased restrictions were necessary.[33] Given that evidentiary void, the Tenth Circuit, even if reluctant to apply strict scrutiny, should have found Oklahoma's increased restrictions unnecessary and unduly burdensome and reversed the lower court. Federalistic concerns may justify deference to state legislative programs, but such deference should not override the fundamental philosophy of democratic participation embodied in the Constitution. Absent proof that increased ballot access restrictions are in fact necessary to

27. 405 U.S. 134 (1972).

28. *Id.* at 143.

29. *Id.* at 144.

30. *Compare* Lubin v. Panish, 415 U.S. 709, 719 (1974) (reasonable restrictions permissible); American Party of Texas v. White, 415 U.S. 767, 781 (1974) (restrictions valid unless "significantly less burdensome" alternatives available) *with* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979) (least drastic means required).

31. *Cf.* Storer v. Brown, 415 U.S. 724, 738 (1974) (expressing concern over ballot access requirement which would effectively increase petition signature requirement, especially if such increase resulted in requirement that signatures of more than five percent of electorate be obtained).

32. *See* Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979) (noting important role of Abolitionist and Progressive parties).

33. Judge Seymour cogently observed that there was no evidence that Oklahoma's prior, less restrictive method of ballot regulation had been inadequate. 687 F.2d at 1382-83 (Seymour, J., dissenting).

protect ballot integrity,[34] such increased regulations should be struck down.

## II. FREEDOM OF SPEECH

### A. *Libel: Characterizing a Statement as Fact or Fantasy Falls Within the Province of the Court:* Pring v. Penthouse International, Ltd.

In the heavily publicized case of *Pring v. Penthouse International, Ltd.*,[35] a divided Tenth Circuit Court of Appeals panel overturned a jury verdict finding Penthouse magazine liable for libel.[36] The Penthouse article portrays the thoughts and acts of a Miss Wyoming at a Miss America contest.[37] The article describes Miss Wyoming as performing fellatio with several male companions, thereby causing them to levitate, with several of the acts unwittingly performed during a national television broadcast.[38] In the article Miss Wyoming also performs fellatio-like acts with her baton and thinks she might save the world by performing similar acts with various world leaders.[39]

The court utilized a two-part test in its treatment of this defamation action. The threshold question was whether the publication was about the plaintiff.[40] The jury specifically found that the plaintiff was the Miss Wyoming about whom the article was written.[41] The court of appeals found that the jury's determination was supported by the record, and accepted the jury's conclusion that the publication was about the plaintiff.[42]

The second element of the two-part analysis was whether the story could reasonably be understood as describing actual facts or events about the plaintiff or actual conduct of the plaintiff.[43] Two Supreme Court opinions were drawn on in articulating the "reasonably understood" requirement, and in holding that the fantastic nature vel non of a statement was a question of law. In both *Greenbelt Cooperative Publishing Association v. Bresler*[44]

34. The court stated that plaintiffs were effectively arguing that any party receiving 1.2% of the popular vote is entitled to retain ballot position. *Id.* at 1380. This contention is not well-taken. Plaintiffs did not challenge increased access requirements on the basis of their quantitative showing, but rather on the qualitative nature of their showing. Essentially, plaintiffs argued that under the previous certification program they would have been treated as having sufficient popular support to retain ballot position, and that absent a showing that the old system violated ballot integrity increased restrictions were improper.

35. 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 3112 (1983).

36. 695 F.2d at 440-41.

37. *Id.* at 441.

38. *Id.*

39. *Id.* at 439.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. 398 U.S. 6 (1970). In *Greenbelt* the plaintiff had certain property which the city wanted to buy and other property which he wanted rezoned. Both matters were before the city council at the same time. Various speakers at council meetings referred to the plaintiff's bargaining position as blackmail. A newspaper article reporting on the city council proceedings referred to those statements. After an independent review of the record, the Court held that the newspaper article was not defamatory as a matter of law because no reader could understand the article to mean that the plaintiff had actually been charged with blackmail. *Id.* at 13-14.

and *National Association of Letter Carriers v. Austin*,[45] the Supreme Court held that liability for defamation could not be imposed because the challenged articles involved expressions of opinion which could not reasonably be interpreted as describing a real state of affairs concerning the plaintiffs.[46] Although *Greenbelt* and *Letter Carriers* factually involved constitutional protection for opinion, the Tenth Circuit read both cases as requiring an appellate court to determine whether any type of statement was capable of constituting an assertion of fact.[47] In doing so the Tenth Circuit properly rejected the suggestion that the factual nature of a statement was a question for the jury. The constitutional imperative to protect freedom of expression requires judicial characterization of a statement as ideaistic (and therefore nonactionable) or factual (and therefore potentially actionable).[48] Thus, although *Pring* involved fantasy and not opinion, the Tenth Circuit properly delineated the allocation of functions between the judge and jury.

Turning to the merits, the court of appeals found the challenged portions of the Penthouse article to be "impossibility and fantasy within a fanciful story."[49] According to the court, it would have been impossible for a reader not to have understood that the article was pure fantasy.[50] Because the court considered the Penthouse article to be pure fantasy which could not be taken to imply facts concerning the plaintiff's actual activities, it reversed the lower court, and held that the story could not be defamatory.[51]

Judge Breitenstein's dissent argued that Penthouse should not be allowed to escape liability by embellishing fact with fantasy.[52] He viewed the article as describing factual incidents (performance of fellatio) and fanciful events (public performance of fellatio, levitation as a result of fellatio).[53] Because the jury was able to identify the plaintiff as the subject of the article, and because they could reasonably conclude from the article that plaintiff had committed fellatio, an act of "sexual deviation or perversion," the dissent found sufficient evidence to support a finding of libel.[54]

Essentially, the two opinions debate the degree to which a potentially ideaistic statement can be severed from its context and treated as factual, and therefore independently actionable. In *Pring* that debate is more academic than real. Plaintiff's amended complaint limited the libelous imputa-

45. 418 U.S. 264 (1974). In *Letter Carriers* a union publication referred to the plaintiffs as "scabs" and asserted that as scabs plaintiffs were traitors to God, country, family, and class. *Id.* at 268. The Court cited *Greenbelt* in disallowing recovery for defamation, and stated that there was no libel because the statements concerning treason could not, as a matter of law, be taken as suggesting plaintiffs were in fact traitors. *Id.* at 285-86. While the *Letter Carriers* holding is based on labor law policies, the grounding of these policies in first amendment concerns, *see id.* at 277-83, makes the decision relevent to first amendment analysis.

46. *See supra* notes 41-42.

47. 695 F.2d at 442.

48. *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (first amendment oriented primarily towards protecting expression of ideas).

49. 695 F.2d at 441.

50. *Id.* at 443.

51. *Id.* Appellate power to review lower court rulings on the ideaistic nature of a statement is well established. *See Greenbelt*, 418 U.S. at 282.

52. *Id.* at 444 (Breitenstein, J., dissenting).

53. *Id.* at 444-45.

54. *Id.*

tions to either creation of the impression that plaintiff performed fellatio while on national television, creation of the impression that plaintiff performed fellatio with a named individual, or the imputation that plaintiff performed fellatio-like acts with her baton at the Miss America pageant.[55] The dissent's emphasis that the article was libelous in imputing that Miss Wyoming engaged in fellatio in and of itself is therefore misplaced, as plaintiffs did not (apparently for tactical reasons)[56] plead that libel. Given the limited scope of the alleged libel in the context of a fanciful, ostensibly humorous[57] article, the majority's decision seems correct.

### B. *Invasion of Privacy: Application of Defamation Standards*

In *Rinsley v. Brandt*[58] the court of appeals affirmed the district court's entry of summary judgment against plaintiff Rinsley in his action for invasion of privacy. Rinsley alleged that a book written and published by the defendants had invaded his privacy by placing him before the public in a false light.[59] The book in question, *Reality Police: The Experience of Insanity in America*, sharply criticized Dr. Rinsley's treatment of patients in mental institutions. The trial court found that the challenged portions of the book were either true, or were opinions and therefore not actionable.[60]

The court, in considering Rinsley's appeal, analogized false light privacy actions to defamation actions.[61] Essential to both actions is a determination that the matter published is not true.[62] Because a false statement is required, truth is an absolute defense to both actions.[63] Additionally, because opinions are not assertions of fact and are therefore not actionable,[64] statements which are opinion do not create liability for invasion of privacy.[65]

Rinsley first challenged the propriety of the district court making a summary determination that certain statements in the book were true. The Court of Appeals noted that whether a statement is true or false is a question of fact,[66] and upheld the district court's decision regarding the truth of the statements because Rinsley failed to raise a genuine issue of fact.[67] Additionally, Rinsley's own testimony confirmed the accuracy of the challenged passages,[68] making the trial court's summary determination altogether

55. *Id.* at 441.
56. *See id.*
57. Penthouse labeled the article as a "humorous" piece. *Id.* at 444 (Breitenstein, J., dissenting). This labeling is insufficient to determine liability, however. *See* Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29 (1979).
58. 700 F.2d 1304 (10th Cir. 1983).
59. *Id.* at 1305.
60. *Id.*
61. *Id.* at 1307.
62. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652E comment a (1977)).
63. 700 F.2d at 1307.
64. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974). *See also supra* notes 43-48 and accompanying text.
65. 700 F.2d at 1307.
66. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 617 (1977), which states that the truth of statement is a question for the jury in defamation actions).
67. 700 F.2d at 1308.
68. *Id.*

proper.

In reviewing the district court's finding that particular portions of the book were opinion, the Tenth Circuit noted that the determination as to whether a statement is an assertion of fact or an opinion is a question of law.[69] The court concluded that the challenged passages were not actionable because they did not suggest any undisclosed facts that might be false,[70] but were merely exaggerated expressions of criticism.[71]

### C. *State Power to Limit Broadcast Advertising of Alcohol Under the Twenty-First Amendment*

In *Oklahoma Telecasters Association v. Crisp*[72] the Tenth Circuit considered the constitutionality of portions of the Oklahoma Alcoholic Beverage Control Act. The act prohibited television broadcasters and cable television operators from advertising alcoholic beverages.[73] Telecasters and cable operators filed separate suits against Crisp, the director of the Oklahoma Alcoholic Beverage Control Board, claiming that the law violated their rights to free speech.[74] The district court granted the plaintiffs' separate motions for summary judgment, ruling that the state's power to regulate liquor pursuant to the twenty-first amendment[75] did not override the first amendment rights of the telecasters and cable operators.[76] Crisp appealed from the summary judgments rendered by the district court; his appeals were consolidated for consideration by the Tenth Circuit.

The critical issue on appeal was the precedential effect of the Supreme Court's dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*[77] for want of a substantial federal question.[78] Beginning with *Hicks v. Miranda*[79] the Supreme Court has consistently held that summary dispositions are decisions on the merits, and as such are binding on lower federal courts.[80] Although summary dispositions are binding, the precedential value of summary dispositions are limited. Only when the constitutional questions presented in an earlier case's jurisdictional statement are clearly the issues before a lower court is the lower court bound by a Supreme Court summary disposition.[81]

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69. *Id.* at 1309 (citing National Association of Letter Carriers v. Austin, 418 U.S. 264, 283-84 (1974)).

70. 700 F.2d at 1309 (citing RESTATEMENT (SECOND) OF TORTS § 566 (1977).

71. 700 F.2d at 1309.

72. 699 F.2d 490 (10th Cir.), *cert. granted sub nom.* Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 66 (1983). A more extensive analysis of *Oklahoma Telecasters* appears *infra* in Comment, *The Substantive Fallacy of the Twenty-first Amendment: A Critique of Oklahoma Telecasters Association v. Crisp*, 61 Den. L.J. 239 (1984).

73. *See* OKLA. STAT. tit. 37, § 516 (1981).

74. 699 F.2d at 492.

75. U.S. CONST. amend XXI, § 2 provides: "The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

76. 699 F.2d at 493.

77. 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 456 U.S. 902 (1982).

78. Queensgate Inv. Co. v. Liquor Control Comm'n, 456 U.S. 902 (1982).

79. 422 U.S. 332 (1975).

80. *Id.* at 344-45.

81. Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curium). *See also Oklahoma Telecasters*,

The court of appeals examined the jurisdictional statement in *Queensgate* and concluded that the constitutional issues presented there were substantially identical to those present in *Oklahoma Telecasters*.[82] The Tenth Circuit characterized the plaintiffs in both cases as arguing that liquor advertising was protected commercial speech, that the twenty-first amendment did not ex proprio vigore allow a state to infringe on protected commercial speech, and that a state's restrictions unconstitutionally burdened free speech rights.[83] Having determined that the issues presented by *Queensgate* were presented by *Oklahoma Telecasters*, the court concluded that it was obligated to uphold Oklahoma's regulation of liquor advertising.[84]

Despite the effect of *Queensgate*, the court proceeded to undertake an independent examination of the Oklahoma law. The basis for this decision was the Supreme Court's admonition against excessive reliance on summary dispositions, and the fact that the laws in *Oklahoma Telecasters* imposed more severe restrictions than those upheld in *Queensgate*.[85] The court therefore decided to proceed independently, treating *Queensgate* as a warning against too easily finding Oklahoma's laws unconstitutional.[86]

The court began its independent examination by noting that the Oklahoma law could be viewed either as a regulation incident to the sale of liquor or as a means by which the state protects its people from the dangers attending alcohol use.[87] In either event the Oklahoma law was within the authority granted to the states by the twenty-first amendment, and was therefore entitled to an added presumption of validity.[88] The court then analyzed the Oklahoma restrictions with reference to the standards *Central Hudson Gas and Electric Corp. v. Public Service Commission*[89] established for determining the validity of regulations touching commercial speech.[90]

*Central Hudson* set forth a four-pronged approach to review of commercial speech regulations: 1) whether the commercial speech concerns lawful activity and is not misleading; 2) whether the governmental interest underlying regulation is substantial; 3) whether the regulation directly advances the governmental interest; and 4) whether the regulation is more extensive than necessary.[91] The court quickly disposed of the first two steps in the *Central Hudson* analysis, finding that neither the sale nor use of alcohol was illegal, that advertisements for alcoholic beverages were not inherently misleading,[92] and that several substantial state interests were affected by alcohol abuse: health and safety of citizens, highway safety, family stability, and the

699 F.2d at 496 (listing relevant Supreme Court cases). Even where a summary affirmance acts as binding precedent a lower court is free to reject the reasoning used by the affirmed court. *Oklahoma Telecasters*, 699 F.2d at 496. *See Mandel*, 432 U.S. at 176-77.

82. 699 F.2d at 497.
83. *Id.*
84. *Id.*
85. *Id. See Mandel*, 432 U.S. at 176-77.
86. 699 F.2d at 497.
87. *Id.*
88. *Id.* at 498.
89. 447 U.S. 557 (1980).
90. *See* 699 F.2d at 498-502.
91. 447 U.S. at 566.
92. 699 F.2d at 500.

productivity of the work force.[93] To these already substantial interests the court added the state's twenty-first amendment power to regulate alcoholic beverages.[94] Thus, the first two prongs of the test were satisfied.[95]

Regarding the third part of the *Central Hudson* test, the court held that Oklahoma was not required to use the best means to advance its interest, but was only required to choose a means directly advancing the state interest.[96] Accordingly, even though no evidence tied reducing advertising to a reduction in alcohol consumption, the court held that the advertising prohibitions were reasonably related to reducing the sale and consumption of alcoholic beverages.[97] The court noted that the alcohol industry's advertising conduct indicated that it was not unreasonable to recognize the consumption/advertising connection;[98] in conjunction with the deference to state action arising by virtue of the twenty-first amendment, the advertising restrictions plainly were a means to directly advance the state's interests.[99]

Analysis of the fourth prong was more problematic. Appellees argued that the Tenth Circuit should uphold the lower court's finding that a ban on all rebroadcasting of alcohol-related commercials was excessive.[100] Noting that the point was not without difficulty, the Tenth Circuit nonetheless reversed the lower court. Analogizing Oklahoma's restrictions to the ban on substantially all billboard advertising upheld in *Metromedia, Inc. v. City of San Diego*,[101] the court essentially held that no advertising business has the right to control the use of its chosen medium.[102] Given the extensive state authority stemming from the twenty-first amendment, and the availability of other mediums for acquiring alcohol-related information, Oklahoma's restrictions, even if severe, were not excessive.[103] Because Oklahoma's laws did not unconstitutionally burden appellee's commercial speech rights, the lower court was reversed and its injunction against enforcement of the laws dissolved.[104]

## III. *McKAY V. UNITED STATES*: JUSTICIABILITY OF NUCLEAR TORTS REVISITED

In *McKay v. United States*[105] the Tenth Circuit Court of Appeals considered the justiciability of tort claims seeking redress for property damages allegedly caused by release of radiation from a nuclear munitions plant. *Mc-*

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 501.
98. *Id.*
99. *Id.*
100. *Id.*
101. 453 U.S. 490 (1981).
102. 699 F.2d at 502.
103. *Id.*
104. *Id.* Judge McKay's brief concurring opinion added an interesting twist to the decision. Judge McKay noted that the challenged laws were enacted by voter referendum, and replaced a previous prohibition ordinance. Given the quid pro quo conceived by the voters (i.e. total regulatory package for surrender of prohibition), he doubted the court's power to sever the challenged provision from the entire regulatory regime. *Id.* (McKay, J., concurring).
105. 703 F.2d 464 (10th Cir.), *cert. denied*, 103 S.Ct. 3085 (1983).

*Kay* provided the Tenth Circuit with its first opportunity to apply its holding in the landmark *Silkwood v. Kerr-McGee Corp.*[106] decision, although that application seems questionable in light of the trial court's holding.[107]

### A. *Background and Lower Court Opinion: Non-Justiciability through Primary Jurisdiction*

Owners of land surrounding the Rocky Flats nuclear weapons plant brought suit against the United States government and the plant's operators (federal defendants), and against several state defendants, alleging that the plant's operation had tortiously injured plaintiffs' property.[108] The landowners' complaint asserted negligence, nuisance, liability without fault, and an unconstitutional "taking."[109] In addition to demanding attorney's fees and twenty-six million dollars of compensatory damages plaintiffs' prayer included a request for one-hundred-sixty million dollars in exemplary damages.[110]

After years of pretrial activity, the United States District Court for the District of Colorado granted the federal defendants' motion for summary judgment on the grounds that the plaintiffs' complaint did not present justiciable issues.[111] The basis of the trial court's finding of non-justiciability was the pervasive federal administrative agency role in determining permissible radiation levels from nuclear facilities in the context of the political decision to operate a nuclear facility at Rocky Flats.[112] This combination of factors led the district court to hold that the doctrine of primary jurisdiction operated to preclude judicial consideration of plaintiffs' claims against the federal defendants.[113]

Plaintiffs' claims were grounded in the allegation that Rocky Flats had created a widespread health hazard, and that this general hazard had damaged their property. Plaintiffs did not allege the existence of personal injury

106. 667 F.2d 908 (10th Cir. 1981), *rev'd in part*, 52 U.S.L.W. 4043 (U.S. Jan. 11, 1984) (No. 81-2159). For fuller discussion of *Silkwood, see* Note, Silkwood v. Kerr-McGee Corp.: *Preemption of State Law for Nuclear Torts?*, 12 ENVTL. L. 1059 (1982); Note, *Federal Preemption: State Law Principles of Strict Liability in a Nuclear Accident—a Preemption Problem in Light of the Price-Anderson Act?*, 6 U. DAYTON L. REV. 279 (1981); Comment, Silkwood v. Kerr-McGee Corp.: *Workers' Compensation and Federal Preemption Rescue the Nuclear Tortfeasor*, 60 DEN. L.J. 291 (1982).

107. *See infra* notes 133-35 and accompanying text.

108. *McKay*, 703 F.2d at 465.

109. *Id.* at 466. The takings claim was disposed of by noting that the Court of Claims had exclusive jurisdiction over such claims when exceeding $10,000. *Id.* at 469-70. In upholding the Court of Claims' exclusive jurisdiction, the Tenth Circuit rejected plaintiffs' contention that these takings claims could be heard under the doctrine of pendent jurisdiction. *Id.* at 470.

110. *Id.* at 466.

111. Good Fund Ltd.—1972 v. Church, 540 F. Supp. 519 (D. Colo. 1982), *rev'd sub nom.* McKay v. United States, 703 F.2d 464 (10th Cir.), *cert. denied*, 103 S.Ct. 3085 (1983). The claims against the state defendants were not dismissed. *See* 703 F.2d at 548 (holding that only claims against federal defendants are dismissed).

112. *See* 540 F. Supp. at 537-48.

113. *Id.* at 538-39. The doctrine of primary jurisdiction requires a court to defer to agency factfinding where legislative intent and agency expertise dictate that an agency, not a court, should serve as factfinder. Primary jurisdiction therefore operates to divest a court of any function except judicial review of the agency decision. B. SCHWARTZ, ADMINISTRATIVE LAW §§ 166-168 (1976).

to any specific person.[114] The Environmental Protection Agency (EPA),[115] however, had determined that the off-site radioactivity effects from Rocky Flats had not created a general health and safety hazard.[116] Given EPA's conclusion, the court held that it lacked jurisdiction to entertain tort claims grounded in allegations relating to creation of a general health hazard.[117] Any finding contrary to that of the EPA would usurp the agency's factual conclusion, based on its statutory jurisdiction, that Rocky Flats' operation had not created a general health hazard.[118] Deference to agency jurisdiction therefore precluded any judicial action except consideration of the arbitrariness of the EPA's findings concerning Rocky Flats' generalized health effects.[119]

Buttressing the reasons for finding primary jurisdiction were the national defense aspects of Rocky Flats. The trial court noted that the decision to operate Rocky Flats was reviewed annually,[120] and that the judiciary has traditionally recognized that questions concerning national defense (including its nuclear component) are usually left to the other branches of government.[121] Given the political nature of the Rocky Flats operation, and the existence of an agency having statutory jurisdiction over the health and safety issues involved in the lawsuit, and a special competence in resolving those issues, a proper respect for the judiciary's constitutional role required recognition of, and deference to, EPA's primary jurisdiction.[122]

### B. *The Appellate Opinion: Justiciability Through Non-Preemption*

On appeal, the Tenth Circuit did not frame the issues in terms of primary jurisdiction, instead analyzing the trial court's opinion as a finding that state tort remedies had been preempted through either pervasive regulation or the presence of a political question.[123] Seizing on the distinction the lower court had drawn between claims of individualized personal injury and the claims presented concerning property damage,[124] the Tenth Circuit pointed out that if preemption existed for property injuries it would also exist for personal injuries.[125] The court, on the basis of its *Silkwood* decision,

114. 540 F. Supp. at 545.

115. *Id.*

116. The Environmental Protection Agency (EPA) had jurisdiction to determine the health and safety effects of Rocky Flats' radioactive releases. *Id.* at 537.

117. *Id.* at 538. Plaintiffs argued that the EPA's findings were not final, were the result of a collusive attempt by government agencies to insulate themselves from liability, were not final agency action, and were improperly promulgated, with the result that the doctrine of primary jurisdiction did not mandate deference to the findings. *Id.* at 540-43. The trial court rejected these contentions, finding them insufficient to justify assuming jurisdiction. *Id.* The Tenth Circuit, because it did not analyze the trial court's primary jurisdiction conclusions, *see infra* notes 123-132 and accompanying text, did not consider these arguments.

118. 540 F. Supp. at 538-39.

119. *Id.*

120. *Id.* at 545.

121. *Id.* at 547.

122. *Id.*

123. McKay v. United States, 703 F.2d 464, 466 (10th Cir.), *cert. denied*, 103 S. Ct. 3085 (1983).

124. 703 F.2d at 466-67.

125. *Id.*

then simply rejected the viability of a preemption analysis with respect to state tort claims requesting compensatory damages.[126]

Having rejected preemption as a basis for denying plaintiffs their requested relief the court of appeals turned to what it perceived to be the alternate ground for the trial court's decision, which was the presence of a political question.[127] The political question doctrine is rooted in separation of powers principles,[128] and seeks to avoid judicial usurpation of political branch prerogatives by refraining from judicial decisionmaking on questions constitutionally reserved for the political branches.[129] The Tenth Circuit, while recognizing that certain aspects of the Rocky Flats operation had political overtones (e.g. the decision to operate the plant),[130] rejected the proposition that deciding to provide civil remedies to plaintiffs injured by radiation releases involved a political question.[131] Hence, plaintiffs' claims were justiciable.[132]

### C. *Critique*

The circuit court's opinion, while probably correct in terms of existing precedent, does not satisfactorily address the lower court's opinion. The district court did not base its holding on a straight-forward preemption theory, recognizing that *Silkwood* precluded such an approach.[133] Instead, the court examined whether the doctrine of primary jurisdiction precluded consideration of tort claims based on the generalized health and safety effects of Rocky Flats, explicitly recognizing that with respect to issues not falling within the EPA's jurisdiction (e.g. the effect of Rocky Flats on a single individual),[134] primary jurisdiction was inapplicable. Further, the lower court did not use the political question doctrine as an alternate basis for its rejection of plaintiffs' claims. The political nature of atomic weapons production was merely an additional justification for finding that executive agencies had primary jurisdiction to investigate the effects of governmental conduct in the production of such weapons.[135] Had the the lower court opinion been ad-

126. *Id. Silkwood* held that compensatory tort actions were not preempted by federal regulation. 667 F.2d at 922. This aspect of *Silkwood* was not affected by the Supreme Court's review of the case.

127. 703 F.2d at 467-69.

128. *Id.* at 470.

129. Baker v. Carr, 369 U.S. 186 (1962).

130. 703 F.2d at 470.

131. *Id.* at 471-72. Applying the test enunciated in Baker v. Carr, 369 U.S. 186 (1962), the court noted the lack of a textual commitment of this issue to a political branch, the availability of manageable judicial standards for resolving these claims, and the general propriety of judicial action in the circumstances presented by this litigation. 703 F.2d at 471. *See Baker v. Carr*, 369 U.S. at 217.

132. 703 F.2d at 472.

133. 540 F. Supp. at 532.

134. *Id.* at 545.

135. The lower court's "political question" analysis states:

> The plaintiffs' contentions are that the manner in which these authorized operations have been conducted has caused the deposition of transuranium elements on their lands which then have become unusable because of claimed resultant health hazards. It is my considered view that the determination of the existence of such hazards and the acceptability of them are also political decisions for the Congress and the President. *They have placed responsibility for the collection and evaluation of the relevant data in the*

dressed on its own terms, *McKay* might easily have reached a different result.

## IV. CASE DIGESTS

### A. *Speech Restrictions Created by Drug Paraphernalia Laws*

In three separate cases the court of appeals considered the constitutionality of drug paraphernalia laws.[136] Each statute or ordinance was attacked as being vague and overbroad, and as permitting prosecution on the basis of a third person's intent.[137] For the most part the court found its decision in *Hejira Corp. v. MacFarland*[138] to be dispositive of these challenges, holding that the intent element of the statute cured any vagueness problems.[139] Additional challenges, however, involving suppression of speech effects from the regulations, raised new issues in the Tenth Circuit.

The speech challenges fell into two categories: non-commercial and commercial. The non-commercial challenges centered around the statutory criteria for discerning the presence of drug paraphernalia. These criteria provided that the content of descriptive materials accompanying an object could be used to define its paraphernalia status.[140] The court rejected this challenge, holding that the first amendment impact, if any, was merely incidental to regulation of nonspeech conduct (presumably sale of the accompanying paraphernalia object) associated with the protected speech.[141] Because the regulations were narrowly drawn to regulate nonspeech conduct, their incidental impact on protected speech was constitutionally permissible.[142]

The commercial speech objections arose from statutory provisions criminalizing advertising of drug paraphernalia by a person with actual or constructive knowledge that the advertised items constituted paraphernalia.[143] The trial courts ruled that the bans, which barred advertising over wide geographical areas,[144] were more extensive than required by the state interest at hand and therefore unconstitutional.[145] The Tenth Circuit re-

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*designated agencies and in the absence of a showing that there has been a violation of the agency standards, this court has no power to intervene*. Accordingly, all of the plaintiffs' claims against the United States, Dow, and Rockwell must be dismissed for lack of jurisdiction.

*Id.* at 548 (emphasis supplied).

136. General Stores, Inc. v. Bingaman, 695 F.2d 502 (10th Cir. 1982) (challenging N.M. STAT. ANN. § 30-31-2 (1978)); Kansas Retail Trade Cooperative v. Stephan, 695 F.2d 1343 (10th Cir. 1982) (pre-effective date challenge to H.B. 2020); Weiler v. Carpenter, 695 F.2d 1348 (10th Cir. 1982) (challenging Clovis, N.M. Ordinance No. 1150-80 (July 24, 1980)).

137. *General Stores, Inc.*, 695 F.2d at 503; *Stephan*, 695 F.2d at 1345-46; *Weiler*, 695 F.2d at 1349.

138. 660 F.2d 1356 (10th Cir. 1981).

139. *E.g.*, *Stephan*, 695 F.2d at 1343 ("a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed") (quoting Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982)).

140. *General Stores, Inc.*, 695 F.2d at 503; *Weiler*, 695 F.2d at 1350.

141. *General Stores, Inc.*, 695 F.2d at 504-05; *Weiler*, 695 F.2d at 1350.

142. *General Stores, Inc.*, 695 F.2d at 505; *Weiler*, 695 F.2d at 1350.

143. *Stephan*, 695 F.2d at 1345; *Weiler*, 695 F.2d at 1350.

144. *Stephan*, 695 F.2d at 1345 (statewide); *Weiler*, 695 F.2d at 1350 (no geographic limit).

145. *Stephan*, 695 F.2d at 1347; *Weiler*, 695 F.2d at 1350. *Cf.* Central Hudson Gas & Electric

jected these rulings,[146] apparently on the ground that the advertising proposed an illegal transaction, and was therefore not protected by the first amendment.[147]

The only defect in any of the laws was in the Clovis, New Mexico city ordinance, which provided for forfeiture of paraphernalia without a hearing.[148] The court said that a hearing in connection with the forfeiture was required, but that a post-forfeiture hearing would suffice.[149]

B. *Constitutionality of Bankruptcy Court Filing Fees*

In *Otasco, Inc. v. United States (In re South)*[150] debtors of Otasco filed for bankruptcy, naming Otasco as a creditor. Otasco filed pleadings objecting to having the debts discharged, and was required to pay a filing fee in connection with these pleadings.[151] Instead of paying the fee, Otasco filed a motion claiming that the filing fee was an unconstitutional burden on its right to protect its property from governmental action.[152] The bankruptcy court agreed, and ruled that the fee requirement was unconstitutional as violative of due process.[153] The district court affirmed.[154]

Otasco argued that creditors of bankrupts are placed in a position where they must defend their property rights and that the imposition of a filing fee to defend those rights unconstitutionally burdens their access to the courts.[155] Otasco relied primarily on its interpretation of *Boddie v. Connecticut*[156] and read that decision to declare filing fees unconstitutional when they operated to preclude access to the courts for the litigation of fundamen-

Corp. v. Public Service Comm'n, 447 U.S. 557, 564 (1980) (restrictions on commercial speech cannot be more extensive than necessary).

146. *Stephan*, 695 F.2d at 1347-48; *Weiler*, 695 F.2d at 1350. The court's comments in *Stephan* appear to be dicta, as neither party appealed the trial court's ruling on the advertising ban. 695 F.2d at 1347-48.

147. The exact basis for the Tenth Circuit's rulings is unclear. The district court's decision in *Stephan* had two bases, first that the ban was geographically overbroad, and second that the ban reached non-paraphernalia advertisers. *Stephan*, 695 F.2d at 1347. The Tenth Circuit properly rejected the second, or categorical, overbreadth rationale. *See* Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 496-97 (1982) (overbreadth doctrine inapplicable to commercial speech). The geographical overbreadth argument, which is grounded in the requirement that commercial speech regulation be no broader than necessary, was not addressed in *Stephan*. *See* 695 F.2d at 1347-48.

In *Weiler*, the court relied on its ruling in *Stephan* and the Supreme Court's *Flipside* ruling in reversing the trial court. *See* 695 F.2d at 1350. Because neither *Stephan* nor *Flipside* address the problem of overextensive restrictions of commercial speech, *Weiler* is necessarily grounded in a finding that the proposed speech is unconstitutional because proposing an illegal transaction. *Cf. Flipside*, 455 U.S. at 496 (government can ban speech proposing illegal transaction). Similarly, *Stephan* appears grounded in *Flipside*'s recognition that speech proposing illegal transactions can be banned in its entirety.

148. *Weiler*, 695 F.2d at 1350.

149. *Id.* at 1351.

150. 689 F.2d 162 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1522 (1983).

151. 689 F.2d at 164.

152. *Id.* at 164.

153. 6 Bankr. 645 (Bankr. W.D. Okla. 1980), *aff'd*, 10 Bankr. 889 (W.D. Okla. 1981), *rev'd*, 689 F.2d 162 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1522 (1983).

154. 10 Bankr. 889 (W.D. Okla. 1981), *rev'd*, 689 F.2d 162 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1522 (1983).

155. 689 F.2d at 164.

156. 401 U.S. 371 (1971).

tal rights.[157]

The Tenth Circuit Court of Appeals explained that *Boddie* did not hold that access to the judicial system can never be burdened, but instead instituted a balancing test.[158] When access to court is burdened, the interest the individual is seeking to protect in court is balanced against the governmental interest in imposing the restriction.[159] Otasco was seeking to protect its contractual rights, none of which touched fundamental interests.[160] Against Otasco's interests were balanced the governmental interest in recouping the costs of the bankruptcy system and in discouraging creditors from harassing debtors rather than genuinely contesting discharge.[161] In light of the nonfundamental nature of Otasco's interest, the legitimate governmental interests in exacting the fee, and Otasco's ability to pay, the Tenth Circuit concluded that the filing fee did not unconstitutionally burden access to the courts.[162]

### C. *Residency Requirements*

*Smith v. Paulk*[163] considered the constitutionality of an Oklahoma statute which required applicants for employment agency licenses to have been Oklahoma residents for one year.[164] After being denied a license solely because of his failure to meet the residency requirement,[165] Smith filed suit against the Oklahoma Commissioner of Labor alleging that the residency requirement violated Smith's rights under the privileges and immunities, equal protection, and due process clauses of the United States Constitution.[166] The district court held that the Oklahoma law violated the privileges and immunities clauses of article IV and the fourteenth amendment by restricting the right to travel.[167]

The court of appeals noted that it was a corporate application which had been denied, and that corporations do not have the benefit of the privileges and immunities clause or the fourteenth amendment.[168] Despite these facts, the court ruled that because Smith intended to relocate to manage the corporation, personal rights to migrate were restricted by the statute, rendering Smith's claims justiciable.[169]

The Tenth Circuit applied Supreme Court case law holding that legislation which restricts the right of interstate migration must be justified by

157. 689 F.2d at 164.
158. *Id.* at 165.
159. *Id.*
160. *Id.*
161. *Id.* at 165-66.
162. *Id.* at 166.
163. 705 F.2d 1279 (10th Cir. 1983).
164. OKLA. STAT. tit. 40, § 53(b) (1981).
165. 705 F.2d at 1281.
166. *Id.*
167. *Id.*
168. *Id.* at 1283. To support the proposition that a corporation does not have the benefit of the privileges and immunities clauses the court cited Western & Southern Life Ins. Co. v. Standard Bd. of Equalization, 451 U.S. 648, 656 (1981); Asbury Hosp. v. Cass County, 326 U.S. 207, 210-11 (1945), and Hemphill v. Orloff, 277 U.S. 537, 548-50 (1928).
169. 705 F.2d at 1284.

compelling state interests and must be narrowly tailored to achieve those interests.[170] The court stated that a less lengthy residency requirement would adequately serve the state interest of investigating applicants to ensure that employment agencies operated in the public interest.[171] Hence, although the residency requirement was itself a proper legislative measure, the existence of an alternative less restrictive than the one-year requirement rendered the Oklahoma statute unconstitutional.[172]

D. *Associational Standing to Challenge Third Party Subpoena*

In *Grandbouche v. United States*[173] the Tenth Circuit considered the issue of standing to protect the first amendment right of association from governmental invasion through subpoena. A grand jury subpoena served on the First National Bank of Englewood, Colorado ordered production of all records pertaining to the accounts of two groups advocating noncompliance with the federal tax system.[174] The two groups and individual members of one of the groups brought suit asking that the subpoena be quashed on the grounds that enforcement of the subpoena would violate first amendment rights of association.[175] The district court ruled that the petitioners lacked standing to raise the first amendment claims because the subpoena was directed to a third party.[176]

The court of appeals reversed the district court and remanded the case for a hearing to consider whether the petitioner's first amendment rights would actually be violated by enforcing the subpoena.[177] First amendment guarantees were distinguished from fourth and fifth amendment rights, which cannot be infringed unless the governmental action is directed at the holder of the right.[178] The court observed that the right to associate freely will be chilled equally whether associational information is compelled from an organization itself or from third parties.[179] Accordingly, an organization and its members have standing to protect their first amendment rights of association which are infringed by governmental information gathering activities directed at third parties.[180]

*Nathan Chambers*
*Peter C. Forbes*

170. *Id.*
171. *Id.* at 1285.
172. *Id.*
173. 701 F.2d 115 (10th Cir. 1983).
174. The groups were the National Commodity & Barter Association (NCBA) and the National Unconstitutional Tax Strike Committee (NUTS). *Id.* at 116.
175. *Id.*
176. *Id.*
177. *Id.* at 118-19.
178. *Id.* at 117.
179. *Id.* at 118.
180. *Id.*

# COMMENT, THE SUBSTANTIVE FALLACY OF THE TWENTY-FIRST AMENDMENT: A CRITIQUE OF *OKLAHOMA TELECASTERS ASSOCIATION V. CRISP*

## I. INTRODUCTION

Oklahoma stringently restricts media advertising of alcoholic beverages, both by statute[1] and by state constitution.[2] State authority to restrict alcohol-related advertisements is based on inherent police power and on the twenty-first amendment,[3] which delegates to the states power to regulate the importation and distribution of alcoholic beverages within their borders.[4] In *Oklahoma Telecasters Association v. Crisp*,[5] television broadcasters and cable television operators challenged Oklahoma's advertising prohibitions, claiming that the restrictions violated their free speech rights and were inconsistent with equal protection principles.[6] The Tenth Circuit, reversing the district court, ruled that Oklahoma could restrict television and cable television advertisements promoting alcoholic beverages even when Oklahoma's regulations virtually banned television advertising of liquor in Oklahoma.[7]

The Tenth Circuit determined that the crucial issue on the merits was whether Oklahoma's advertising ban violated the plaintiffs' rights to engage in commercial speech.[8] Accordingly, the court decided the case on this issue and held that Oklahoma's regulations were a permissible infringement of plaintiffs' commercial speech rights.[9] On appeal, the Supreme Court will review the free speech issue, and will also consider whether Oklahoma's prohibitions are preempted by federal regulation of cable broadcasting.[10]

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1. OKLA. STAT. tit. 37, § 516 (1981) provides:

> It shall be unlawful for any person, firm or corporation to advertise any alcoholic beverages or the sale of same within the State of Oklahoma, except one sign at the retail outlet bearing the words "Retail Alcoholic Liquor Store," or any combination of such words or any of them and no letter in any such sign shall be more than four (4) inches in height or more than three (3) inches in width, and if more than one line is used the lines shall not be more than one (1) inch apart.

2. OKLA. CONST. art. XXVII, § 5 provides: "It shall be unlawful for any person, firm, or corporation to advertise the sale of alcoholic beverage within the State of Oklahoma, except one sign at the retail outlet bearing the words, "Retail Alcoholic Liquor Store."

3. U.S. CONST. amend. XXI.

4. The pertinent section of the twenty-first amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." *Id.* § 2. *See also infra* notes 170-80 and accompanying text.

5. 699 F.2d 490 (10th Cir.), *cert. granted*, 104 S. Ct. 66 (1983).

6. 699 F.2d at 493. The equal protection claim was based on Oklahoma's inconsistent treatment of broadcast and print media. Newspapers and magazines published outside of Oklahoma but circulated within the state were permitted to carry advertisements of alcoholic beverages while this freedom was denied to telecasters. The trial court did not reach the equal protection issue, and therefore it was not before the Tenth Circuit on appeal. *Id.* at 490 n.1. A similar equal protection challenge failed in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

7. 699 F.2d at 502.

8. *Id.* at 498.

9. *Id.* at 502.

10. *See* Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 66 (1983) *granting cert. to* Oklahoma

## II. *OKLAHOMA TELECASTERS ASSOCIATION V. CRISP*

### A. *Background*

Pursuant to the Oklahoma Constitution and state statute,[11] television broadcasters in Oklahoma were required to "block out" television advertising for wine.[12] Failure to comply with this requirement, or the solicitation or acceptance of advertisements for alcohol, subjected broadcasters to possible criminal prosecution.[13] In 1980, the Attorney General of the State of Oklahoma issued an opinion stating that cable operators were subject to the prohibitions against alcoholic beverage advertising applicable to television broadcasters.[14] The Alcoholic Beverage Control Board, the state agency charged with primary responsibility for enforcing Oklahoma's alcohol control laws,[15] then notified cable operators of its intention to enforce compliance with the restrictions on liquor advertisements.[16]

Following the Board's notification, telecasters and cable operators filed separate suits against Crisp, in his capacity as director of the Board, requesting declaratory judgments that Oklahoma's advertising restrictions violated their constitutionally protected speech rights, and requesting injunctive relief preventing Oklahoma from enforcing its restrictions.[17] In nearly identical memorandum opinions and orders, the district court granted the plaintiffs' summary judgment motions and ruled that the power of the states to regulate liquor pursuant to the twenty-first amendment did not override the commercial speech rights of the telecasters and cable operators.[18]

### B. *The District Court Opinion*

The district court applied the four-part commercial speech analysis set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*[19] to

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Telecasters Ass'n v. Crisp, 699 F.2d 490 (10th Cir. 1983). The Supreme Court granted certiorari on three questions:

1) May a state adopt, consistently with protection of commercial speech under the First and Fourteenth Amendments, a sweeping ban on truthful, nonmisleading advertising for a lawful product?

2) May a state prevent, consistently with the First and Fourteenth Amendments, cable television operators from carrying out-of-state news and entertainment programs because those programs contain truthful, non-misleading advertising for wine?

3) Is a state's regulation of liquor advertising, as applied to out-of-state broadcast signals, valid in light of existing federal regulation of cable broadcasting?

52 U.S.L.W. 3230, (U.S. Oct. 4, 1983)(No. 82-1795).

11. *See supra* notes 1-2.

12. 699 F.2d at 492. Beer advertisements were not prohibited. Under OKLA. STAT. tit. 37, § 506(3) (1981), beer containing less than 3.2% alcohol is not subject to the restrictions of Oklahoma's alcoholic beverage control laws. Because television advertising of beer can refer to beer containing either more or less than 3.2% alcohol, beer advertising is permitted. *See* 699 F.2d at 492.

13. 699 F.2d at 492.

14. *Id.*

15. *See* OKLA. STAT. tit. 37, § 514 (1981).

16. 699 F.2d at 492.

17. *Id.* at 492-93.

18. *Id.* at 493.

19. 447 U.S. 557 (1980). The four-part analysis for determining the validity of commercial speech regulation can be summarized as follows. First, the court inquires whether the commercial speech concerns a lawful activity without misleading the public. Second, the court must

determine the constitutional validity of Oklahoma's laws.[20] The district court concluded that the restrictions did not directly advance the state's asserted interest in reducing alcohol consumption, and were more extensive than necessary to meet the stated interest.[21] Plaintiffs' motions for summary judgment were therefore granted, and permanent injunctions were entered prohibiting Crisp and the Board from enforcing the regulations against either the cablecasters or the telecasters.[22]

### C. *The Tenth Circuit Opinion*

On appeal to the Tenth Circuit, Crisp focused on the trial court's application of the *Central Hudson* analysis, and emphasized the significance of the Supreme Court's recent summary dismissal of the appeal in *Queensgate Investment Co. v. Liquor Control Commission*[23] for lack of a substantial federal question.[24] In *Queensgate*, the Ohio Supreme Court had upheld the constitutionality of Ohio's restrictions on off-premises alcohol advertising in the face of a free speech attack.[25] Crisp argued that the summary dismissal of *Queensgate* was dispositive of the issues presented in *Oklahoma Telecasters*.[26]

While recognizing that preemption was a potential issue,[27] the Tenth Circuit did not address the preemption question. Rather, it agreed with Crisp that the precedential effect of *Queensgate*'s summary disposition was the critical issue on appeal.[28]

#### 1. Controlling Effect of the Summary Dismissal of *Queensgate*

*Hicks v. Miranda*[29] is the leading case on the precedential effect of a summary dismissal for want of a substantial federal question. *Hicks* analyzed the precedential distinctions created by the fundamental differences between the Court's appellate jurisdiction and its certiorari jurisdiction.[30]

Supreme Court appellate jurisdiction exists when a state statute is challenged in state court on the grounds that the statute is incompatible with the Constitution, and the statute's validity is upheld.[31] Unlike certiorari jurisdiction, appellate jurisdiction is mandatory.[32] The Supreme Court is not,

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find that the government asserts a substantial state interest. If the answers to the first two questions are positive, then the court proceeds to consider whether the speech regulation directly advances the asserted governmental interest, and whether the regulation is more extensive than necessary to meet the government interest. *See id.* at 564.

20. 699 F.2d at 493.

21. *Id.*

22. *Id.*

23. 69 Ohio St. 2d 361, 433 N.E.2d 138, *appeal dismissed*, 103 S. Ct. 31 (1982).

24. 699 F.2d at 494.

25. 69 Ohio St. 2d at 366-67, 433 N.E.2d at 142.

26. 699 F.2d at 494.

27. *See id.* at 492. For a discussion of the preemption issues presented by *Oklahoma Telecasters, see infra* notes 148-73 and accompanying text.

28. 699 F.2d at 494.

29. 422 U.S. 332 (1975).

30. *See infra* notes 31-34 and accompanying text.

31. 28 U.S.C. § 1257(2) (1976).

32. *Hicks*, 422 U.S. at 344. The decision to assume jurisdiction via a writ of certiorari lies within the Court's discretion. SUP. CT. R. 17.1.

however, required to grant plenary review to an appealed case; the Court is only required to address the merits of the appeal.[33] Consequently, summary dismissal of an appeal for want of a substantial federal question is a decision on the merits and leaves the appealed judgment undisturbed.[34]

As precedent, summary dismissals are binding on lower courts confronted with the constitutional issues presented in the dismissed appeal.[35] Once an issue has been declared unsubstantial and not deserving of review, lower courts cannot disregard that pronouncement.[36] As a comment on the merits, however, the summary dismissal's effect is limited to the precise issues presented in the jurisdictional statement.[37] Lower courts are therefore prohibited from reaching an opposite conclusion on the precise constitutional conclusion affirmed by the Supreme Court, but are not bound by the affirmed court's reasoning.[38]

In considering the effect of *Queensgate*'s summary affirmance, the Tenth Circuit utilized the methodology set forth in Justice Brennan's concurrence to *Mandel v. Bradley*.[39] Justice Brennan outlined two considerations as relevant when determining the controlling effect of a summary dismissal. First, a court must examine the jurisdictional statement presented by the earlier case, and ascertain whether the constitutional questions presented in both cases are the same.[40] If both cases present the same constitutional issue, the court must determine that the prior judgment in fact rested upon decision of the constitutional questions, and "not even arguably upon some alternative nonconstitutional ground."[41]

The Tenth Circuit found that *Oklahoma Telecasters* involved substantially the same constitutional issues presented in *Queensgate*'s jurisdictional statement.[42] Under the court's analysis, both cases involved the state's power, pursuant to the twenty-first amendment, to attempt to limit alcohol-related problems by prohibiting "some, but not all, forms of liquor advertis-

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33. 422 U.S. at 344.

34. *Id. Accord* Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam).

35. *Mandel*, 432 U.S. at 176.

36. *Id.*

37. *Hicks*, 422 U.S. at 344-45.

38. *Mandel*, 432 U.S. at 176. In clarifying this area of law, the Court stated:

> Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. . . . Summary actions, however, . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

*Id.*

39. 432 U.S. 173 (1977). *See* 699 F.2d at 496.

40. 432 U.S. at 180 (Brennan, J., concurring).

41. *Id.*

42. 699 F.2d at 496. The jurisdictional statement in *Queensgate* presented the following question for Supreme Court appellate review:

> Whether Regulation 4301:1-1-44 of the Ohio Liquor Control Commission, which prohibits a duly licensed retail liquor permit holder from advertising the retail price of alcoholic beverages in any medium visible from outside the permit premises, violates the First and Fourteenth Amendments of the Constitution of the United States by suppressing the public dissemination of truthful information about a lawful activity.

699 F.2d at 496-97.

ing."[43] The court also determined that the judgment in *Queensgate* in fact rested on the constitutional issues presented by the jurisdictional statement, and was not based on some nonconstitutional ground.[44] The Tenth Circuit concluded that it was therefore bound to follow *Queensgate* and uphold the constitutionality of Oklahoma's advertising restrictions.[45]

### 2. Interaction Between the Twenty-first Amendment and Commercial Speech

The decision to follow *Queensgate* did not terminate the Tenth Circuit's review. Responding to a Supreme Court admonition not to misunderstand the effect and use of a summary dismissal,[46] the court of appeals examined the merits of the broadcasters' challenges.

The crucial question on the merits was whether applying the advertising prohibitions to the broadcasters violated their constitutional rights of free speech.[47] Resolution of this question required the court to balance the plaintiffs' right to engage in commercial speech against Oklahoma's inherent power, as enhanced by the twenty-first amendment, to regulate advertisements dealing with alcoholic beverages.[48]

As a threshold matter, the court held that regulating alcohol-related commercials was an exercise of the authority granted by the twenty-first amendment.[49] This conclusion stemmed from recognition that states have the power, under the twenty-first amendment, to totally prohibit the sale of alcohol within their borders[50] and the power to regulate the circumstances under which liquor is sold.[51] Limiting advertisements directly related to the sale of alcohol was seen as a reasonable way of limiting alcohol abuse and its associated problems, and was therefore held to be a permissible subject of state regulation pursuant to the twenty-first amendment.[52] Because the regulations were enacted pursuant to police power conferred by the twenty-first amendment, they were entitled to an added presumption of validity.[53]

After establishing the nature of Oklahoma's advertising restrictions, the court considered the interaction between the authority delegated by the twenty-first amendment and first amendment protections. Conceding that the broadcasters were engaged in commercial speech entitled to some degree

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43. 699 F.2d at 497.

44. *Id.*

45. *Id.*

46. *See Mandel*, 432 U.S. at 177. In *Mandel* the Court cautioned lower courts not to be so pre-occupied with a summary dismissal that they failed to recognize independent issues presented by a case sub judice. *Id.*

47. 699 F.2d at 498.

48. *Id.*

49. *Id.*

50. *Id.* (citing New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715 (1981) (per curiam); Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939)).

51. 699 F.2d at 498 (citing New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715 (1981)).

52. 699 F.2d at 498. *But see infra* notes 177-83 and accompanying text.

53. *Id.* (quoting New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 718 (1981)).

of constitutional protection,[54] the Tenth Circuit applied the four-part analysis enunciated in *Central Hudson*.[55] Guiding the court's application of the test was *Central Hudson*'s recognition that commercial speech, although constitutionally protected, is afforded less protection than other forms of speech.[56]

Disagreeing with the district court's determination that the advertising prohibitions did not directly advance the state's interest and were more extensive than necessary, the Tenth Circuit upheld Oklahoma's restrictions.[57] Examining the "direct advancement" strand of the *Central Hudson* inquiry, the court held that Oklahoma was not required to prove that its regulations in fact advanced its asserted interests.[58] Rather, the inquiry was whether the regulations could reasonably be said to advance the state's interest.[59] Because it was reasonable to believe that banning alcohol advertising could effect the state's interest in reducing alcohol consumption, the regulations directly advanced the state's interest.[60]

Turning to the trial court's conclusion that the regulations were more extensive than necessary to effect the state's goal, the Tenth Circuit noted that the basis for this conclusion was the fact that the advertising ban prohibited all rebroadcasting of alcohol-related advertisements.[61] Citing the plurality opinion in *Metromedia, Inc. v. City of San Diego*,[62] the court held that a total ban on the use of one medium of advertising did not, in and of itself, render a commercial speech regulation overbroad.[63] Given the availability of other mediums for advertising (notably printed publications and on-premises advertising), Oklahoma's law clearly did not eliminate dissemination of alcohol-related information.[64] In light of Oklahoma's enhanced police power under the twenty-first amendment,[65] and the forms of advertising which were permitted, Oklahoma's restrictions were not more unconstitutionally overextensive.[66] Thus, the restrictions satisfied the constitutional requirements of *Central Hudson*.[67]

## III. ANALYSIS OF THE TENTH CIRCUIT'S HOLDINGS IN *OKLAHOMA TELECASTERS*

### A. *The Tenth Circuit's Reliance on* Queensgate *was Incorrect*

In *Oklahoma Telecasters* the Tenth Circuit relied directly on the Supreme

54. *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

55. 699 F.2d at 499-501. For an exposition of *Central Hudson*'s four-part inquiry, *see supra* note 19.

56. *Central Hudson*, 447 U.S. at 563. *See* 699 F.2d at 499, 502.

57. 699 F.2d at 502.

58. *Id.* at 501.

59. *Id.*

60. *Id.*

61. *Id.*

62. 453 U.S. 490 (1981).

63. *See* 699 F.2d at 501.

64. *Id.* at 502.

65. *See supra* notes 50-53 and accompanying text.

66. 699 F.2d at 502.

67. *Id.*

Court's summary dismissal of *Queensgate*.[68] Although the court ultimately examined the merits of the broadcasters' challenge, its primary holding found Oklahoma's advertising restrictions valid in light of the *Queensgate* dismissal.[69] As noted above, in order for a summary dismissal to be binding in a subsequent case the constitutional issues presented by both cases must be the same.[70] In *Mandel v. Bradley*,[71] the Court determined that because the facts of the case before the court were different than those in a case which had been summarily dismissed, the summary action was not binding in the subsequent case.[72] Similarly, major factual differences between *Queensgate* and *Oklahoma Telecasters* render *Queensgate* invalid as controlling precedent for *Oklahoma Telecasters*.

The Ohio regulation[73] at issue in *Queensgate* restricted the freedom of specified licensees to advertise alcohol prices on their licensed business premises,[74] and also prohibited those licensees from advertising a price advantage in relation to the alcohol they sold.[75] Those licensees, along with manufacturers and distributors, were still permitted to advertise the retail price of alcohol in any form of the media,[76] although permit holders were prohibited from off-premise advertising of the retail price of beer.[77] Clearly, the regulation of commercial advertising challenged in *Queensgate* was limited, and, as a whole, rather permissive. Conversely, the Oklahoma regulations operated as a virtual ban on advertising concerning alcoholic beverages.[78] Beer may be advertised because of Oklahoma's statutory definition of alcohol,[79] and magazines and periodicals containing alcohol-related advertisements are al-

68. *See supra* notes 42-45 and accompanying text.

69. *See* 699 F.2d at 497.

70. *See supra* notes 35-38 and accompanying text.

71. 432 U.S. 173 (1977).

72. *Id.* at 177. The Court stated: "The precedential significance of the summary action in [Tucker v. Salera, 424 U.S. 959 (1976)], however, is to be assessed in the light of all the facts in that case; and it is immediately apparent that those facts are very different from the facts of this case." 432 U.S. at 177. The factual differences stemmed from the different provisions of the laws challenged in each case. *See id.*

73. 5 OHIO ADMIN. CODE § 4301:1-1-44 (1978). This regulation provides in pertinent part:

> No alcoholic beverages shall be advertised in Ohio except in the manner set forth in 4301:1-03 and as hereinafter provided.
>
> (A) As to advertising on the premises, holders of Class C, D, and G permits shall not advertise the price per bottle or drink of any alcoholic beverage, or in any manner refer to price or price advantage except within their premises and in a manner not visible from the outside of said premises.
>
> (B) Manufacturers and distributors of alcoholic beverages are permitted to advertise their products in Ohio.
>
> Holders of Class C, D, and G permits shall be authorized to advertise in newspapers of general circulation, radio and television, on bill boards, calendars, in or on public conveyances and in regularly published magazines. Advertising may include the retail price of the original container or packages, but such advertising may not in any manner refer to price advantage.

*Id.*

74. *See id.*

75. *See id.*

76. *See id.*

77. OHIO REV. CODE ANN. § 4301.211 (Page 1982).

78. *See supra* notes 2, 12.

79. *See supra* note 12.

lowed if the publications are imported into Oklahoma.[80] These are the only types of liquor advertisements permitted by Oklahoma law.[81] Oklahoma's regulations are obviously very restrictive, almost totally prohibiting alcohol advertisements, whereas Ohio's regulations prohibit only very limited types of advertising.[82] Ohio's prohibitions are similar to reasonable time, place, and manner restrictions on speech because they restrict where and how permit holders are allowed to advertise rather than virtually banning this form of expression.[83] Thus, the scope of Oklahoma's advertising ban is one factual difference rendering *Queensgate* inapposite.[84]

The second significant factual difference is that the plaintiffs in *Queensgate* were liquor permit holders,[85] and as such were subject to rules and regulations issued by the state agency granting their license.[86] The licensees therefore exercised their privileges subject to the provisions under which the license was granted. In *Oklahoma Telecasters*, the plaintiffs were either television broadcasters licensed by the Federal Communications Commission[87] or cable operators operating under local franchises[88] and subject to federal regulation.[89] *Queensgate* and *Oklahoma Telecasters* therefore involve factually distinguishable regulatory relationships.

A state agency's regulation of its licensees will raise different constitutional issues than an agency's attempt to enforce subject matter restrictions against independent cable operators and television broadcasters. In *Queensgate*, the Ohio Supreme Court specifically found that the advertising regulations at issue were properly enacted and within the scope of the Liquor Control Commission's statutory authority to regulate its licensees.[90] The issue in *Queensgate*, then, was whether a state agency could regulate its licensees by restricting their commercial speech rights in a limited manner.[91] Indeed, this is precisely the issue set forth in the jurisdictional statement on appeal to the Supreme Court.[92]

*Oklahoma Telecasters*, unlike *Queensgate*, involves a state agency which has issued regulations governing federal licensees or local franchisees whose operating privileges were not granted by the Alcoholic Beverage Control Board. Further, unlike the regulations challenged in *Queensgate*, the Oklahoma regu-

80. 699 F.2d at 493 n.1.

81. *See id.* at 492, 493 n.1.

82. *Compare* OKLA. STAT. tit. 37, § 516 (1981) *with* 5 OHIO ADMIN. CODE § 4301:1-1-44 (1978).

83. *Cf.* Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 650 (1981) (establishes four-part test for determining whether time, place, and manner restrictions on free speech will be permitted); Cox v. New Hampshire, 312 U.S. 569 (1941) (upholding reasonable time, place, and manner restriction for use of public streets).

84. *Cf.* Mandel v. Bradley, 432 U.S. 173, 177 (1977) (differing statutory schemes were factual difference precluding existing summary affirmance from constituting controlling precedent).

85. *Queensgate*, 69 Ohio St. 2d at 361, 433 N.E.2d at 139.

86. *See* OHIO REV. CODE ANN. § 4301.03 (Page 1982).

87. *See* 47 U.S.C. § 301 (1976 & Supp. V 1981).

88. *See* OKLA. CONST. art. XIII, § 5.

89. *See generally* United States v. Southwestern Cable Co., 392 U.S. 157 (1968).

90. *Queensgate*, 69 Ohio St. 2d at 363-64, 433 N.E.2d at 140.

91. *See id.* at 366, 433 N.E.2d at 142.

92. *See supra* note 42.

lations prohibit any advertising of alcohol by the plaintiffs within the state of Oklahoma.[93] Finally, the Oklahoma regulations may be in direct conflict with federal law and regulations concerning cable television.[94] The two issues presented by the facts of *Oklahoma Telecasters* are therefore whether Oklahoma may issue regulations governing federal licensees in direct contrast to existing federal regulations, and whether Oklahoma may ban virtually all alcohol-related advertisements by a particular segment of the media. The difference in the extensiveness of the Ohio and Oklahoma regulations and the differing regulatory relationships between the agencies and plaintiffs in the two cases render the issues presented by *Queensgate* and *Oklahoma Telecasters* substantially different. Hence, the Tenth Circuit's reliance upon the summary dismissal of *Queensgate* was improper.

### B. *Commercial Speech and the Twenty-first Amendment*

#### 1. *Oklahoma Telecasters* Subordinates Commercial Speech to Twenty-first Amendment Police Power

This analysis of the Tenth Circuit's application of the *Central Hudson* test to Oklahoma's regulations focuses on the Tenth Circuit's conclusions that the regulations directly advanced the asserted governmental interest and were no more restrictive than necessary.[95] Oklahoma's asserted interest in limiting advertising was to reduce the sale and consumption of alcohol and thereby reduce the accompanying problems associated with alcohol abuse.[96] The Tenth Circuit found this interest to be substantial, and declared it to be "exceptionally strong" in view of the additional police power delegated by the twenty-first amendment.[97] Because Oklahoma's prohibitions reasonably related to reducing the sale and consumption of alcohol,[98] the court determined that, as a matter of law, Oklahoma's laws directly advanced its asserted interest.[99] The court's final inquiry under the *Central Hudson* analysis was whether the restrictions were more extensive than necessary to meet the governmental interests. Even though the prohibitions banned virtually all alcohol-related commercials by the plaintiffs, the court found that the regulations were not more extensive than necessary.[100] Although the court relied on the availability of other sources of advertising as one reason for upholding the regulation,[101] the primary theme of the court's decision was that commercial speech related to alcohol is entitled to minimal constitutional protection. *Central Hudson* was characterized as being primarily "a balancing test."[102] When the power granted by the twenty-first amendment was considered in conjunction with Oklahoma's inherent police power, the balance

93. *See supra* note 2.
94. *See infra* notes 160-73 and accompanying text.
95. *See* 699 F.2d at 501-02.
96. *Id.* at 500.
97. *Id.*
98. *Id.* at 501.
99. *Id.*
100. *Id.*
101. *Id.* at 502. *See supra* notes 64-65 and accompanying text.
102. 699 F.2d at 502.

shifted in favor of the state, "permitting regulation of commercial speech that might not otherwise be permissible."[103] The court believed that this balance was mandated by the Supreme Court's summary dismissal of *Queensgate*.[104] Both conclusions, however, are incorrect.

2. Commercial Speech and the Twenty-first Amendment

Truthful advertisements for the sale of lawful products are a protected form of speech under the first amendment because freedom of speech necessarily protects the right to receive information and ideas.[105] Although commercial speech comes within the purview of the first amendment, it is given less protection than other forms of expression.[106] In *Central Hudson*, the Supreme Court developed an intermediate level of scrutiny for determining whether regulation of commercial speech passes constitutional muster.[107] For a regulation of commercial speech to be valid, the *Central Hudson* test requires that it directly advance a substantial governmental interest and not be more extensive than necessary to serve that interest.[108]

At the heart of this portion of this comment is the question of whether the twenty-first amendment's grant of authority to the states to regulate "the transportation or importation"[109] of alcohol includes the power to infringe upon commercial speech rights to a greater degree than if the twenty-first amendment was not involved. In *Oklahoma Telecasters* the Tenth Circuit found that the twenty-first amendment did confer power to regulate commercial speech to a degree which might otherwise be unconstitutional.[110] En banc, the Fifth Circuit has also concluded that restrictions enacted pursuant to a state's twenty-first amendment powers invoke a more relaxed standard of review than is normally applied in commercial speech cases.[111] Essentially, both the Fifth and Tenth Circuits have held that a "rational basis" standard should be used to review regulations regarding alcohol-related commercial speech, rather than the intermediate standard set forth in *Central Hudson*.[112]

Several Supreme Court cases demonstrate, however, that the twenty-first amendment does not necessarily enhance the constitutional significance of a state's interest. Analysis of these cases shows that the twenty-first amendment's effect must be evaluated by reference to the constitutionally protected rights threatened by state regulation. In each of the cases, the Court concluded that it should apply the standard of review customarily associated with the particular constitutional right threatened by state alco-

103. *Id.*
104. *Id.*
105. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 764-70 (1976).
106. *Central Hudson*, 447 U.S. at 566.
107. *Id.*
108. *Id.*
109. *See supra* note 4.
110. *See supra* note 103 and accompanying text.
111. Dunagin v. City of Oxford, 718 F.2d 738, 745 (5th Cir. 1983) (en banc), *appeal filed*, 52 U.S.L.W. 3582 (U.S. Feb. 14, 1984) (No. 83-1221).
112. *Dunagin*, 718 F.2d at 745; *Oklahoma Telecasters*, 699 F.2d at 501-02.

hol restrictions. Further, an analysis of the Court's leading cases involving alcohol-related restrictions of speech contradicts the Tenth Circuit's conclusion that regulations promulgated pursuant to the twenty-first amendment are entitled to special deference.

3. *Oklahoma Telecasters'* Subordination of Commercial Speech is Not Justified by Supreme Court Precedent

In *Craig v. Boren*[113] the Court struck down an Oklahoma law which mandated different drinking ages for men and women, declaring the law to be a violation of the equal protection clause of the fourteenth amendment.[114] Oklahoma argued that pursuant to the twenty-first amendment it had "enhanced" police power to regulate the drinking age within the state, and that its statutory scheme was therefore not subject to normal equal protection strictures.[115] The Court expressly rejected Oklahoma's argument that the twenty-first amendment limited the operation of the fourteenth amendment, and held that invidious discrimination was not saved by virtue of the state's power to regulate liquor under the twenty-first amendment.[116] Examining the history of liquor regulation culminating in the twenty-first amendment, the Court concluded that the amendment "primarily created an exception to the normal operation of the Commerce Clause."[117]

> Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." . . . Any departures from this historical view have been limited and sporadic.[118]

The Court went on to apply the standard mandated by the equal protection clause.[119] Because the Oklahoma law made a gender-based distinction, strict scrutiny was not applied. Rather, the Court used an intermediate level of review similar to the standard used in *Central Hudson*.[120]

Similarly, in *Wisconsin v. Constantineau*[121] the Supreme Court implicitly rejected a claim that the power conferred by the twenty-first amendment limited constitutional due process protections. *Constantineau* involved a state statute authorizing public officials to publicly post a notice stating that alcohol sales to named persons were prohibited because the state had determined that those persons were public burdens when they drank alcohol.[122] The

113. 429 U.S. 190 (1976).
114. *Id.* at 210.
115. *See id.* at 204.
116. *Id.* at 205, 209.
117. *Id.* at 206.
118. *Id.* (quoting P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 258 (1975)).
119. *See* 429 U.S. at 210.
120. *See id.* at 197.
121. 400 U.S. 433 (1971).
122. *Id.* at 434.

statute failed to provide notice and opportunity for hearing prior to the public posting.[123] The fact that twenty-first amendment powers were involved did not stop the Court from applying strict due process standards in examining the statute.[124]

More recently, the Court decided *Larkin v. Grendel's Den, Inc.*,[125] which involved the establishment clause[126] and a state liquor zoning statute.[127] The statute authorized churches and schools to veto liquor license applications for places of business within 500 feet of the church or school.[128] The Court struck down the statute, declaring that the state may not exercise its power under the twenty-first amendment in a way that impinges upon the constitutional protections embodied in the establishment clause.[129] Application of the normal standard of review for cases arising under the establishment clause was therefore required.[130]

Finally, *California v. LaRue*[131] and *New York State Liquor Authority v. Bellanca*[132] do not support the conclusion that the twenty-first amendment limits the constitutional speech rights of non-licensee advertisers. Thus, the reliance on these cases by the Fifth[133] and Tenth[134] Circuits is misplaced.

In *LaRue* the Court upheld regulations, promulgated by California's Department of Alcoholic Beverage Control, which prohibited nude dancing and other sexually explicit conduct in establishments holding liquor licenses.[135] Emphasizing that the prohibition applied only to licensed establishments,[136] the court found that the regulations were a permissible exercise of state police power.[137] California's regulation was aimed not at an expression of speech per se, but on conduct associated with the dispensation of alcohol.[138] Thus, the regulation was only incidentally a burden on protected speech.[139] Clearly, *LaRue* does not establish that twenty-first amendment police power generally overrides speech rights when alcohol-related legislation is challenged. At most, *LaRue* establishes that state power to regulate the actual sale of alcohol provides a state with power to regulate speech-related conduct.

Similarly, in *Bellanca* the Court concentrated on the fact that the state

123. *Id.* at 435.
124. *See id.* at 436-37.
125. 103 S. Ct. 505 (1982).
126. U.S. CONST. amend. I, cl. 1 provides in part that "Congress shall make no law respecting an establishment of religion. . . ."
127. MASS. GEN. LAWS ANN. ch. 138, § 16C (West 1974).
128. *Id.*
129. 103 S. Ct. at 510 n.5.
130. *See id.* at 510.
131. 409 U.S. 109 (1972).
132. 452 U.S. 714 (1981).
133. *See* Dunagin v. City of Oxford, 718 F.2d 738, 744-45 (5th Cir. 1983) (en banc).
134. *See Oklahoma Telecasters*, 699 F.2d at 499.
135. 409 U.S. at 118.
136. The Court's analysis began by noting that the challenged regulations were presented "not in the context of censoring a dramatic performance in a theater, *but rather in a context of licensing bars and nightclubs to sell liquor by the drink*." *Id.* at 114. (emphasis supplied).
137. *Id.* at 116, 118.
138. *See id.* at 117-18.
139. *See id.* at 117.

regulations applied only to the premises of state liquor authority licensees.[140] The Court's analysis was couched in terms of the state's power to determine *where* alcoholic beverages could be sold.[141] Given the state's unquestioned power to regulate the conditions under which alcohol was sold, the state's interest in public safety outweighed the speech values associated with topless dancing.[142] Like *LaRue, Bellanca* only establishes a state's power to regulate conduct on a licensee's premises.

Summing up the preceding discussion, it seems clear that the Supreme Court's cases do not support the conclusion that regulation pursuant to the twenty-first amendment enjoys any special exception from general constitutional principles. Moreover, speech restrictions resulting from twenty-first amendment regulation have been upheld primarily because the restrictions applied directly to licensees, and involved only de minimis restrictions on speech rights.[143] The Oklahoma prohibitions, conversely, are aimed directly at speech content, and act as a complete ban on alcohol-related advertisements by non-licensee broadcasters not engaged in selling alcohol. Further, no alternative forums are available for the plaintiffs.[144] The Supreme Court indicated in *Central Hudson* that such complete bans on otherwise protected commercial speech may be presumptively unconstitutional.

> We review with special care regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy. In those circumstances, a ban on speech could screen from public view the underlying governmental policy. . . . Indeed, in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity.[145]

In light of the preceding discussion, the conclusion of the Fifth and Tenth Circuits that the twenty-first amendment permits a state to enact otherwise unconstitutional regulations appears unsupportable. Further, *Queensgate* does not mandate the conclusion that commercial speech values are readily subordinated to twenty-first amendment regulation. As noted, a summary affirmance should not be read to adopt any new ratio decendendi.[146] *LaRue* and *Bellanca*, which are the most directly relevant Supreme Court decisions, did not contain any general discussion of commercial speech/twenty-first amendment interaction. Rather, those decisions address a state's power to regulate its licensees.[147] *Queensgate* is properly read as

140. 452 U.S. at 715-17.

141. The Court stated that "[t]he State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." *Id.* at 717.

142. *Id.* at 718.

143. *See supra* notes 135-42 and accompanying text.

144. Given Oklahoma's complete statutory ban on commercial advertising of alcohol, *see supra* note 1, this argument takes on additional force if plaintiffs are making a facial challenge to the statute, because a facial challenge would obviate the mitigating effects of beer and magazine advertising. The reported opinion does not clearly delineate the posture of the plaintiffs' challenge.

145. *Central Hudson*, 447 U.S. at 566 n.9.

146. *See supra* notes 37-38 and accompanying text.

147. *See supra* notes 135-42 and accompanying text.

applying the limited holdings of *LaRue* and *Bellanca*, rather than as establishing general propositions concerning the interaction of two constitutional amendments. Hence, there is no basis for concluding that Oklahoma's "otherwise unconstitutional" restrictions are validated by twenty-first amendment police power.

## IV. FEDERAL PREEMPTION OF OKLAHOMA'S ADVERTISING RESTRICTIONS

The Tenth Circuit recognized that Oklahoma's laws might conflict with federal regulations, but did not discuss the issue.[148] Nonetheless, one of the issues on appeal to the Supreme Court is whether Oklahoma's restrictions on advertising by cable operators are preempted by federal law.[149] This section will analyze the cable operators' preemption challenge.

### A. *Federal Preemption*

The Constitution's supremacy clause[150] provides that the Constitution and the laws of the United States "shall be the supreme Law of the Land."[151] When Congress exercises its granted powers, federal legislation can supercede, or preempt, state law.[152] Federal regulations, as well as federal statutes, have preemptive force.[153]

Federal law can preempt state law in three ways. Most obviously, state law may be expressly preempted,[154] or the plan or scheme of federal regulation may evince a congressional intent to preempt a field entirely.[155] Usually, however, congressional enactments in a particular area do not expressly end all state authority. Where state and federal rules coexist, state law is preempted only when it conflicts with federal law.[156] State law conflicts with federal law when state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[157] or when "compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce."[158]

148. *Oklahoma Telecasters*, 699 F.2d at 492.

149. *See supra* note 10.

150. U.S. CONST. art. VI, cl. 2. This section provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

151. *Id.*

152. *See generally* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 103 S. Ct. 1713, 1722 (1983).

153. Fidelity Fed. Sav. & Loan v. De La Cuesta, 458 U.S. 141 (1982).

154. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

155. *Pacific Gas*, 103 S. Ct. at 1722; *Fidelity Federal*, 458 U.S. at 153.

156. *Pacific Gas*, 103 S. Ct. at 1722.

157. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

158. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

B. *Conflict Between Federal Law and Oklahoma's Advertising Restrictions*

1. Potential Preemption Through Copyright Laws

The cable operators in *Oklahoma Telecasters* are governed by both federal and state laws. Forseeable conflicts between those bodies of law indicate that Oklahoma's advertising ban may be preempted insofar as it is applicable to cable operators.

Cable television systems are subscription services that pick up broadcasts originated by others (primary transmissions) and rebroadcast them (secondary transmissions) to paying subscribers.[159] Copyright laws protect copyrights upon secondary transmission by prohibiting cable systems from making any alteration in a program or a commercial.[160] Any change, deletion, or addition is actionable as an infringement of a copyright.[161] These statutory provisions reflect congressional awareness of the probability that retransmission of distant non-network programming causes damage to the copyright owner because the program is distributed in areas in which it has not been licensed.[162] To protect the copyright holder, Congress decided that secondary transmissions to the public by a cable system ought to be subject to a compulsory license.[163] Such a license ensures the copyright owner a fair share of royalties from the rebroadcast of the copyrighted work, whether it be a program or a commercial.[164] The protection against infringement actions provided by the license is conditioned upon compliance with specified procedures, including reporting requirements,[165] payment of the royalty fee,[166] and compliance with the ban on the substitution or deletion of commercial advertising.[167]

Oklahoma's "blocking out" requirement[168] potentially conflicts with the compulsory licensing[169] program of the federal copyright laws. A cable

159. *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157, 161 (1968).

160. 17 U.S.C. § 111(c)(3) (1982) provides in pertinent part:

> (c) Secondary Transmissions by Cable Systems.
> The secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico and embodying a performance or display of a work is actionable as an act of infringement . . . if the content of the particular program in which the performance or display is embodied, *or any commercial advertising* or station announcements transmitted by the primary transmitter during, or immediately before or after, the transmission of such program, *is in any way willfully altered by the cable system through changes, deletions, or additions*, except for the alteration, deletion, or substitution of commercial advertisements performed by those engaged in television commercial advertising market research. . . .

(emphasis supplied).

161. *Id.*

162. *See, e.g.*, H.R. REP. NO. 1476, 94th Cong., 2d Sess. 88-91 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5702-04.

163. *Id.* at 89, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5703-04.

164. *Id., reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5703-04.

165. 17 U.S.C. § 111(d)(1)-(2) (1982).

166. 17 U.S.C. § 111(d)(4) (1982).

167. 17 U.S.C. § 111(c)(3) (1982).

168. *See supra* note 12 and accompanying text.

169. Cable system operators are required to obtain the rebroadcast license, *see* 17 U.S.C. § 111(c)(1) (1982), and are therefore necessarily subject to the ban on deletion contained in 17 U.S.C. § 111(c)(3) (1982).

operator's freedom to choose its programming prevents the conclusion that federal copyright law necessarily precludes application of Oklahoma's advertising restriction to cable systems. Unfortunately for Oklahoma, in certain circumstances federal regulations require cable systems to carry specified programming.[170] The copyright laws will, in those circumstances, preempt the operation of Oklahoma's advertising laws.

### 2. Potential Preemption Through Federal Regulation of Cable Systems

Federal regulation of cable systems directly conflicts with Oklahoma's ban on televised alcohol advertising. Federal Communications Commission (FCC) regulations require that cable systems carrying required television broadcast signals[171] must carry the signals without deletion or alteration of any programming, including commercial segments.[172] Because much of Oklahoma may be subject to the mandatory signal requirements,[173] Oklahoma's advertising prohibition can directly conflict with federal regulations.

As a practical matter, it is impossible for most cable operators in Oklahoma to conform to both the federal and state regulations. Oklahoma's laws require Oklahoma's cable operators to inspect all of the primary transmissions they receive, and "block out" alcohol commercials. Clearly, Oklahoma's restrictions on alcohol-related advertisements are void to the extent that they will prohibit cable operators from adhering to federal law. The applicable provisions of the Copyright Act and the FCC cable regulations which forbid signal alteration by cable operators therefore may preempt the Oklahoma laws prohibiting transmission of alcohol commercials.

## V. COMMERCE CLAUSE RESTRICTIONS ON OKLAHOMA'S ALCOHOL ADVERTISING RESTRICTIONS

If the cable operators or television broadcasters are engaged in interstate commerce they will be afforded the protection of the commerce clause.[174] The twenty-first amendment removes the subject of alcohol from the reach of the commerce clause to the extent necessary to allow states to control the transportation or importation of alcohol within their borders.[175] Although this burden on interstate commerce is allowed, interstate businesses dealing with liquor are entitled to some commerce clause protections; the twenty-first amendment "does not pro tanto repeal the commerce

170. *See infra* note 171.

171. Cable systems can be required to carry signals of broadcasters within specified broadcast proximities. 47 C.F.R. § 76.57, -.59, -.61 (1983). Oklahoma's television market is easily reached by out-of-state broadcasters, potentially making Oklahoma's cablecasters subject to the FCC's mandatory signal requirements.

172. *See* 47 C.F.R. § 76.55(b) (1983).

173. *See supra* note 171.

174. U.S. CONST. art. I, § 8, cl. 3. This section provides that "The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

175. *See* Craig v. Boren, 429 U.S. 190, 205-06 (1976). *See generally* Annot., 34 L. Ed. 2d 805 (1972).

clause."[176] Commerce clause implications were not considered by the Tenth Circuit in deciding *Oklahoma Telecasters*. The following brief analysis is provided as further evidence that commercial speech rights cannot be readily subordinated to twenty-first amendment regulation.

In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*[177] the Supreme Court held that New York could not regulate liquor destined for foreign ports and under the control of the Federal Bureau of Customs.[178] Because there was no showing that the liquor subject to regulation would be diverted into New York, the state had no twenty-first amendment regulatory power.[179] *Hostetter* did not read the twenty-first amendment literally; a state's power was limited to "transportation and importation" of liquor which would affect a state's population.[180]

Several years later the Court affirmed a decision declaring that liquor involved in foreign commerce was protected by the commerce clause.[181] The lower court had held that where liquor was not being imported for "delivery and use" within the state, state regulation could not be predicated on the twenty-first amendment.[182]

In light of the restricted scope of twenty-first amendment police power recognized by the Supreme Court, where the object of regulation does not import or transport alcohol for delivery or use within a state, the state's twenty-first amendment power to interfere with interstate commerce is significantly attenuated.[183] Because Oklahoma's advertising ban affects parties merely broadcasting information about alcohol, it constitutes regulation beyond the recognized scope of a state's exclusive power under the twenty-first amendment.[184] The regulation must therefore closely conform to commerce clause principles generally applicable to state laws affecting interstate commerce.[185] State regulations may interfere with interstate commerce to a certain extent, but state prohibitions cannot be oppressive.[186] In this case,

176. 429 U.S. at 206.

177. 377 U.S. 324 (1964).

178. *Id.* at 333-34.

179. *Id.*

180. *Id.* at 333.

181. *See* Lordi v. Epstein, 389 U.S. 29 (1967) (per curiam), *aff'g*, 261 F. Supp. 921 (D.N.J. 1966).

182. 261 F. Supp. at 982.

183. *Cf.* Craig v. Boren, 429 U.S. 190, 206 (1976) (state power outside recognized scope of twenty-first amendment extremely limited).

184. *See supra* notes 177-82 and accompanying text.

185. *Cf.* Craig v. Boren, 429 U.S. 190, 206 (1976): ("[T]he Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision 'be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.'" (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964)). *See also supra* notes 113-47 and accompanying text.

186. *E.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). In *Bibb*, the Court struck down an Illinois statute requiring a certain type of rear fender mudguard on trucks and trailers operating within the state. While recognizing that states have broad powers to regulate safety on intrastate highways, the Court held that the Illinois statute placed too heavy a burden on interstate commerce because Illinois' regulation would subject shippers to other states' contradictory regulations, *id.* at 527, and would therefore cause significant interference with the free flow of interstate commerce. *Id.* at 529-30.

Oklahoma's restrictions create an unreasonable burden upon interstate cable operators and television broadcasters.

Oklahoma's regulations affect not only cable operators and television broadcasters in Oklahoma, but also affect out-of-state operators whose broadcasts are transmitted into Oklahoma. A television network might broadcast into several states, but because the broadcast would be transmitted into Oklahoma the company would be required to delete all alcohol commercials in order to comply with Oklahoma's laws. This would require out-of-state television companies to preview and alter every broadcast, to change their advertising policies, or to limit their marketing areas. Similarly, cable operators might find themselves in the same position, although they service much smaller areas than television broadcasters. A cable company located outside the state may have subscribers in Oklahoma. If so, the cable operator, under Oklahoma law, would have to alter its particular transmissions, change its advertising policies, or limit its available market. Thus, Oklahoma's regulations are arguably an impermissible burden on interstate commerce.

## VI. SUMMARY

The Tenth Circuit's reliance on the summary dismissal of *Queensgate* was incorrect. *Queensgate* involved a state agency narrowly limiting the commercial speech rights of its licensees.[187] *Oklahoma Telecasters* involved a state agency broadly limiting the commercial speech rights of independent actors.[188] Because the Tenth Circuit failed to treat *Queensgate* with the precision required by Supreme Court decisions,[189] it wrongly held that *Queensgate* was controlling.

Analysis of the commercial speech question involves a more complicated issue. Oklahoma's interest, when viewed in conjunction with a constitutional amendment directly supporting that interest, may well be enhanced. Nonetheless, the conclusion that the twenty-first amendment justifies an otherwise unconstitutional regulation of commercial speech, by creating a lesser standard for judicial review, is a substantive fallacy. Case law demonstrates that although the twenty-first amendment may enhance a state's interest in regulating alcohol-related activities, a court's constitutional methodology remains unchanged.[190] Thus, Oklahoma's advertising ban must be evaluated under general commercial speech principles; evaluated under those principles, the regulations must fall.[191]

Further, in light of the federal regulations and laws applicable to cable operators, Oklahoma's advertising prohibitions may be preempted with respect to cable operators. When Oklahoma's statute directly conflicts with federal law,[192] it must give way.

187. *See supra* notes 73-77 and accompanying text.
188. *See supra* notes 78, 87-88, 93 and accompanying text.
189. *See supra* notes 35-38 and accompanying text.
190. *See supra* notes 113-42 and accompanying text.
191. *See supra* notes 143-47 and accompanying text.
192. *See supra* notes 159-73 and accompanying text.

Finally, commerce clause principles indicate that Oklahoma's laws are of questionable validity. Oklahoma's prohibitions do not relate to the process of bringing alcohol into Oklahoma, but rather seek to regulate speech about alcohol legally brought into Oklahoma. Oklahoma's advertising prohibition is therefore not entitled to the special deference granted laws within the clear contemplation of the twenty-first amendment. Instead, the prohibition should be subjected to ordinary commerce clause analysis. Under such an analysis, Oklahoma's advertising ban must fall as an unreasonable burden on interstate commerce.[193]

*Leslie C. Hansen*

193. *See supra* notes 175-86 and accompanying text.

# CRIMINAL LAW

## OVERVIEW

As shown by the title headings, a variety of criminal law issues reached the court in the last year. Among the more significant decisions were constructions of statutes involving food stamp crimes and trial court probationary powers, a constitutional challenge to enhanced sentencing, and the "necessity" defense in the context of political protests.

## I. BLOATING FEDERAL CRIMINAL JURISDICTION: TAKING MONEY BY FALSE PRETENSES AND THE FEDERAL BANK CRIMES STATUTE

Chief Judge Seth's opinion in *United States v. Shoels*[1] interpreted 18 U.S.C. § 2113(b),[2] the Federal Bank Crimes Statute, to include the crime of taking money by false pretenses.[3] This interpretation was subsequently approved by the Supreme Court in *Bell v. United States*,[4] which resolved a circuit court split over the reach of section 2113(b). The *Bell* decision and its federalistic implications will be discussed following a review of the *Shoels* decision and its circuit court antinomes.

### A. United States v. Shoels

In *Shoels*, the Government alleged that the defendant presented a $1,200 personal check for collection at a Denver savings and loan association in July 1980. The check was made payable to Irving Butler, who testified that although he had an account at the savings and loan association he had never received the $1,200 check.[5] Evidence showed that the check had been taken, possibly by Shoels, in a burglary of the home of a man who sold Shoels an automobile earlier in the week.[6] The government contended that Shoels' conduct violated section 2113(b); the jury agreed, finding Shoels guilty.[7]

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1. 685 F.2d 379 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 3117 (1983).
2. 18 U.S.C. § 2113(b) (1982) states in pertinent part:
Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both . . . .
3. Taking money by false pretenses is defined as:
1) A false representation of material present or past fact;
2) Which causes the victim to take certain action;
3) The action taken involves transfer of title;
4) The transfer is to the wrongdoer;
5) The wrongdoer knows his representation is false; and
6) The wrongdoer intends to defraud the victim.
W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 655-72 (1972); R. PERKINS, CRIMINAL LAW 296-319 (2d ed. 1969).
4. 103 S. Ct. 2398 (1983).
5. 685 F.2d at 381.
6. *Id.*
7. *See id.*

Shoels argued on appeal that his actions constituted obtaining money by false pretenses, a state crime which was not punishable under the federal law.[8] His reasoning was that the phrase "to steal or purloin" in section 2113(b)[9] indicated Congress' intent to limit the statute to common law larceny, which did not encompass stealing by false pretenses.[10] The Tenth Circuit disagreed and embraced a broad construction of section 2113(b), relying on *United States v. Turley*,[11] a Supreme Court decision construing the National Motor Vehicle Theft Act.[12]

*Turley* rejected the notion that the word "stolen" in the Motor Vehicle Theft statute was confined to the definition of common law larceny.[13] Finding the word "stolen" to lack an established common law meaning,[14] the Court examined the statute's legislative history and purpose. Three factors were determinative in the decision to reject the proposed limitation on the definition of "stolen." First, there was no indication in the legislative history of an intent to distinguish common-law larceny from other felonious takings.[15] Second, the public and private interests at stake were damaged equally regardless of the nature of the felonious taking.[16] Third, because federal regulation was prompted by the interstate dimensions of the crime it was unlikely that Congress had intended to leave "loopholes for wholesale evasion" of the law.[17]

As noted, the Tenth Circuit cited the *Turley* rationale with favor.[18] This rationale, in conjunction with the paucity of contrary legislative history, led the court to conclude that the words "steal or purloin" in section 2113(b) included behavior not constituting common law larceny.[19]

Relying on essentially the same rationale as *Shoels*, the Second, Third, Fifth, Seventh, and Eighth Circuits had also adopted a broad reading of section 2113(b).[20] Conversely, the Fourth, Sixth, and Ninth Circuits had limited the application of section 2113(b) to common-law larceny.[21] Because an understanding of the reasons for adopting the narrower view is important for understanding the federalisic implications of the Supreme

8. *Id.*

9. *See supra* note 2.

10. *Id.* at 381-82.

11. 352 U.S. 407 (1957).

12. 18 U.S.C. §§ 2311-2313 (1982). The offense under this act involves interstate transportation of a motor vehicle "knowing the same to have been stolen." *Id.* § 2312.

13. The Supreme Court held that the term "stolen" in section 2312 included "all felonious takings of motor vehicles with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." 352 U.S. at 417.

14. 352 U.S. at 411.

15. *Id.* at 414-15.

16. *Id.* at 416.

17. *Id.* at 416-17.

18. 685 F.2d at 382-83. The court also stated that the term "steal" is usually given a broad meaning under federal statutes. *Id.* at 383.

19. *Id.* at 383.

20. *See* United States v. Hinton, 703 F.2d 672 (2d Cir.), *cert. denied*, 103 S. Ct. 3091 (1983); United States v. Simmons, 679 F.2d 1042 (3d Cir. 1982); United States v. Bell, 678 F.2d 547 (5th Cir. 1982), *aff'd*, 103 S. Ct. 2398 (1983); United States v. Guiffre, 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U.S. 833 (1978); United States v. Johnson, 575 F.2d 678 (8th Cir. 1978).

21. *See* United States v. Feroni, 655 F.2d 707 (6th Cir. 1981); LeMasters v. United States, 378 F.2d 262 (9th Cir. 1967); United States v. Rogers, 289 F.2d 433 (4th Cir. 1961).

Court's resolution of the circuit court conflict, the next section examines *LeMasters v. United States*,[22] the most articulate exposition of the "narrower" view.

## B. LeMasters v. United States

LeMasters obtained a duplicate savings passbook for another person's account by misrepresenting his identity, and then used this passbook to withdraw $6,700 from the account.[23] After trial, the defendant moved for acquittal maintaining that while the indictment (based on section 2113(b)) charged larceny, the government had proved the crime of obtaining money by false pretense, not larceny.[24] The trial court denied the motion.[25] The Ninth Circuit reversed, placing emphasis on the legislative history and purpose of section 2113(b).[26]

The Ninth Circuit noted first that although an early form of the bill which became section 2113(b) contained specific provisions for federal punishment of obtaining money by false pretenses, these provisions were deleted by subsequent amendments.[27] Legislative history indicated that Congress deleted the false pretenses provisions because it did not want the United States to enter areas of state concern, such as forgery, fraud, and bad checks.[28] The Ninth Circuit invoked the statute's historical context to support this contention. Federal bank crimes legislation was needed (and intended) to restrict interstate bands of "gangster bank robbers," not to protect banks against all criminal defalcations.[29] Congress intended to address a specific problem, not to federalize crimes involving bad checks and forgeries, crimes which did not significantly threaten interstate commerce and which were already adequately regulated by local law enforcement authorities.[30]

The Ninth Circuit court rejected the *Turley* analogy because the motivation underlying the Motor Vehicle Theft statute was "wholly different" from the purpose animating section 2113(b).[31] The Motor Vehicle Theft statute could be broadly construed because the interstate evils perceived by Congress included all illegal motor vehicle sales.[32] In enacting section 2113(b), Congress was concerned only with evil of interstate bank robbers.[33] *Turley*'s

22. 378 F.2d 262 (9th Cir. 1967).
23. *Id.* at 263.
24. *Id.*
25. *Id.*
26. *Id.* at 263-68.
27. *Id.* at 264-65.
28. *Id.* at 264-66, 268.
29. *Id.* at 265 n.3 (citing S. REP. NO. 537, 73d Cong., 2d Sess. (1934)). Although this report accompanied a predecessor bill to section 2113(b), the court pointed to the lack of any changed circumstances between the time the report issued and the time section 2113(b) was enacted. At both times the salient problem was interstate bank robbery not involving stealth or misrepresentations. 378 F.2d at 265-66.
30. *Cf.* 378 F.2d at 268 (Congress rejected extending federal law to false pretenses because such an extension would "serve no purpose except to confuse and dilute state responsibility for local crimes which were being adequately dealt with by state law.").
31. *Id.* at 267.
32. *Id.*
33. *Id.*

definition of "stolen" was therefore inapposite.[34] Finally, the *LeMasters* court found that the language of section 2113(b) was ambiguous, and that ambiguities in federal criminal statutes should be resolved in favor of the accused, at least where broad construction would result in duplicating a state offense.[35]

### C. Bell v. United States

The Supreme Court resolved the circuit court conflict in *Bell v. United States*,[36] by adopting a broad reading of the statute and holding that the crime of taking by false pretenses was within the scope of section 2113(b).[37] The dissent in *Bell*, however, vigorously criticized the majority as ignoring both the legislative history and *LeMasters'* compelling arguments for judicial restraint in expanding federal criminal jurisdiction.[38]

In *Bell*, a check taken from the mail in Ohio was eventually deposited in a federal savings and loan account in Miami. Bell was arrested and charged with a violation of section 2113(b).[39] Justice Powell, writing for the majority, found that those who favored narrow construction of section 2113(b) based on its text placed false reliance on the statute's "takes and carries away" common law language.[40] Rules of statutory construction normally require that in a federal criminal statute an undefined common law term such as "takes and carries away" must impart its common law meaning.[41] Congress, however, did not incorporate all the elements of common-law larceny into the language of section 2113(b). Because the language used was therefore not consistent with an intent to limit the statute solely to common law larceny,[42] the defendant's proposed common law meaning was not inherently embodied in the statute.[43]

Justice Powell then examined the legislative history of section 2113(b). This section had been added as an amendment to a statute proscribing only those bank thefts involving force or violence or the creation of fear.[44] The Court treated this history as evidencing congressional intent to protect banks from all asset-depleting thefts, regardless of whether all the elements of common-law larceny were present.[45] Unlike the *LeMasters* court, the Court felt that a change in legislative purpose had taken place during the interval between 1934, when a legislative provision directly addressing false pretenses

34. *Id.*
35. *Id.* at 268 (citing Jerome v. United States, 318 U.S. 101 (1943)).
36. 103 S. Ct. 2398 (1983).
37. *Id.* at 2402.
38. *Id.* at 2402-04 (Stevens, J., dissenting).
39. *Id.* at 2399.
40. *Id.* at 2399-2400.
41. *Id.* at 2401 (citing *Turley*, 352 U.S. at 411).
42. 103 S. Ct. at 2401. The Court extracted two textual indicia of an intent to go beyond common-law larceny. First was the application of the statute to non-tangible property; common-law larceny was limited to personal property. Second, the statute—unlike the common law—did not require a taking from the possession of the property's owner. *Id.*
43. *Id.*
44. *Id.* at 2402.
45. *Id.*

was rejected,[46] and 1937, when section 2113(b) was enacted.[47] That change stemmed from experience with a statute which did not encompass nonviolent bank crimes.[48] Reacting to that experience, Congress enacted a statute encompassing all acts involving an illegal "taking and carrying away" of bank assets, regardless of common-law distinctions.[49]

The dissent took a contrary position, and argued forcefully for a narrow reading that would limit the breadth of federal criminal jurisdiction. Justice Stevens found "strong evidence of Congress' specific, limited intent" to confine the statute to takings without a bank's consent.[50] Agreeing that the purpose of the amendment including section 2113(b) was to correct omissions in the original bank crimes statute, he disagreed on the scope of the correction. The original statute did not proscribe taking without violence, burglary, or larceny by stealth, all crimes involving taking without consent.[51] Congress' concern in amending the statute was limited to non-consensual takings; there was no intent to reach all bank crimes.[52] Justice Stevens concluded that the legislative history of the statute precluded an interpretation imposing federal punishment for the crime of obtaining money by false pretenses.[53]

### D. *Federalistic Implications of* Shoels *and* Bell

Justice Stevens' dissent in *Bell* was motivated by a strong aversion to an approach to federal criminal jurisdiction which would subject a person to prosecution by both federal and state authorities for the same act.[54] In his dissent to *McElroy v. United States*,[55] Justice Stevens, after carefully analyzing the legislative history of the statute in question,[56] concluded that the Court should not unnecessarily expand federal criminal jurisdiction in order to prevent the federal prosecutor from "encroach[ing] into an area of state respon-

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46. *See supra* note 29 and accompanying text.

47. *See* Pub. L. No. 75-349, 50 Stat. 749 (1937).

48. 103 S. Ct. at 2402.

49. *Id.* The Court did state that had Bell not "taken and carried away" the money he would not have violated section 2113(b), because the statute requires an asportation. *Id.* at 2401.

50. *Id.* at 2404 (Stevens, J., dissenting).

51. *Id.* at 2403 & nn.3-4.

52. *Id.* The dissent also noted that an unanimous Court had previously rejected an interpretation of federal bank crime laws which would bring all "asset depleting" acts within federal jurisdiction. Justice Stevens quoted the following passage from Jerome v. United States, 318 U.S. 101 (1943):

> It is difficult to conclude in the face of this history that Congress, having rejected in 1934 an express provision making state felonies federal offenses, reversed itself in 1937. . . . It is likewise difficult to believe that Congress, through the same clause, adopted by indirection in 1937 much of the fraud provision which it rejected in 1934.

318 U.S. at 105-06, *quoted with approval in Bell*, 103 S. Ct. at 2404 (Stevens, J., dissenting).

53. 103 S. Ct. at 2404 (Stevens, J., dissenting).

54. *Id.* at 2402.

55. 455 U.S. 642 (1982).

56. *McElroy* construed 18 U.S.C. § 2314 (1982), which prohibits the interstate transportation of forged securities. The Court held that the "interstate" element was satisfied if a security was forged while in the "stream of commerce," regardless of whether the forgery took place prior to the instrument's crossing state lines. 455 U.S. at 653-54. Justice Stevens, dissenting, interpreted the legislative history to require forgery prior to crossing an interstate boundary. *Id.* at 661 (Stevens, J., dissenting).

sibility and . . . cross[ing] a line that Congress has drawn."[57]

The central fault with *Shoels* and *Bell* is that the opinions misread the statutory limits evinced by section 2113(b)'s legislative history. This misreading recognizes the semantic distinction between larceny and obtaining money by false pretenses, but ignores the substantive distinction drawn by Congress. The danger in the jurisdictionally expansive approach underlying *Shoels* and *Bell* is the bloating of federal criminal jurisdiction, and ultimately the "unnecessary growth of a national police force."[58]

## II. DUE PROCESS CHALLENGE TO THE EVIDENTIARY STANDARD IN THE DANGEROUS SPECIAL OFFENDER STATUTE

In *United States v. Schell*[59] Mr. Schell made a five-prong attack on the constitutionality of 18 U.S.C. § 3575,[60] which permits a federal district court to increase the sentence prescribed for a particular offense.[61] To give this increased sentence, the court must make additional factual findings, not required for conviction, that the convicted person is "dangerous"[62] and a "special offender."[63] Schell's challenge, although unsuccessful, raised some

57. 455 U.S. at 675 (Stevens, J., dissenting).

58. *See* 103 S. Ct. at 2403 (Stevens, J., dissenting). Other courts and commentators have expressed concern over expanding federal criminal jurisdiction, especially where "no special federal interest or subject matter is involved." ABRAMS, *Consultant's Report on Jurisdiction*, in 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 34 (1976). *See also* United States v. Archer, 486 F.2d 670 (2d Cir. 1973).

59. 692 F.2d 672 (10th Cir. 1982).

60. 18 U.S.C. § 3575 (1982).

61. 18 U.S.C. § 3575(b)-(d) (1982) provide in relevant part:

> (b) If it appears *by a preponderance of the information*, including information submitted during the trial of such felony and the sentencing hearing and so much of the presentence report as the court relies upon, that the defendant is a dangerous special offender, the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony. Otherwise it shall sentence the defendant in accordance with the law prescribing penalties for such felony.
>
> (c) This section shall not prevent the imposition and execution of a sentence of death or of imprisonment for life or for a term exceeding twenty-five years upon any person convicted of an offense so punishable.
>
> (d) Notwithstanding any other provision of this section, the court shall not sentence a dangerous special offender to less than any mandatory minimum penalty prescribed by law for such felony. This section shall not be construed as creating any mandatory minimum penalty.

(Emphasis supplied).

62. Schell was alleged to be "dangerous" according to the terms of 18 U.S.C. § 3575(f) (1982), which provide: "A defendant is dangerous for purposes of this section if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant."

63. Schell was alleged to be a special offender under 18 U.S.C. § 3575(e)(1) (1982), which provides:

> A defendant is a special offender for purposes of this section if—
>
> (1) the defendant has previously been convicted in courts of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for two or more offenses committed on occasions different from one another and from such felony and punishable in such courts by death or imprisonment in excess of one year, for one or more of such convictions the defendant has been imprisoned prior to the commission of such felony, and less than five years have elapsed between the commission of such felony and either the defendant's release, on parole or otherwise, from imprisonment for one such conviction or his com-

compelling questions about the due process implications of the preponderance evidentiary standard included in section 3575,[64] the dangerous special offender (DSO) sentencing statute.

### A. *The Facts*

Of his own accord, James Schell took liberty from the federal correctional facility at Fort Scott, Kansas.[65] Unfortunately for Mr. Schell, the talons of law ensnared him and he was charged with a violation of the federal prison escape statute.[66] While awaiting trial, Schell once again took french leave; this flight also ended in recapture, producing another escape charge.[67]

The United States attorney filed the required pre-trial notice[68] stating that the government reasonably believed that Schell was a dangerous special offender within the terms of section 3575 and should be given an enhanced sentence.[69] Schell pled guilty to the escape charges.[70] The judge then conducted a DSO hearing to determine if the defendant's criminal behavior was sufficiently aberrant to warrant an enhanced sentence.[71] The trial court found that Schell's pattern of violent criminal activity made him "dangerous" within the meaning of section 3575(f),[72] and that Schell was a "special offender" because the number and temporal proximity of his felony convictions and jail terms satisfied the requirements of section 3575(e)(1).[73] The trial court then used section 3575's enhanced sentencing power to sentence Schell to two consecutive ten-year prison terms.[74] The defendant appealed, alleging that the DSO statute contained numerous constitutional deficiencies and that his sentence was improper under the DSO standards.

### B. *Schell's Challenge*

#### 1. "Organized Crime" Requirement

Schell contended that Congress aimed the harsh provisions of section 3575 at organized crime figures,[75] and that because there was no proof at

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mission of the last such previous offense or another offense punishable by death or imprisonment in excess of one year under applicable laws of the United States, a State, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof.

64. *See supra* note 61.

65. 692 F.2d at 673.

66. 18 U.S.C. § 751(a) (1982). *See* 692 F.2d at 673.

67. 692 F.2d at 673.

68. *See* 18 U.S.C. § 3575(a) (1982).

69. 692 F.2d at 673.

70. *Id.*

71. *Id.* at 674.

72. *Id.* at 675. Schell's criminal record included convictions for bank robbery, aggravated robbery, armed robbery, and murder. *Id.* at 674.

73. *Id.* at 674. The Tenth Circuit explicitly limited its holding to sentences imposed pursuant to the special offender definition under section 3575(e)(1). The DSO statute also permits a person to be characterized as a special offender when that person is a professional criminal or is part of a criminal conspiracy. *See* 18 U.S.C. § 3575(e)(2)-(3) (1982).

74. 692 F.2d at 674.

75. *Id. See generally* Note, *Organized Crime Control Act of 1970*, 4 MICH. J.L. REFORM 546 (1971) (discussing legislative history of section 3575).

trial of his involvement with organized crime the enhanced sentence under the statute violated his due process rights.[76] The Tenth Circuit quickly dismissed this contention, holding that neither the legislative history of section 3575 nor its language limited its application to organized crime figures.[77]

2. Challenge to Finding of "Dangerousness"

Schell argued that because he faced sixty years in prison for other federal and state convictions he was not a threat to the public, and therefore could not be considered "dangerous."[78] The court rejected this argument because the DSO statute was not intended to involve the federal judiciary in the "complexities and uncertainties of the sentencing and parole procedures of other jurisdictions."[79] Trial judges were therefore not required to calculate the imminence of a defendant's release in applying the DSO statute.[80]

3. Eighth Amendment Does Not Bar Enhanced Sentencing

Schell also argued that because he was subject to lengthy federal and state prison terms the additional twenty years imposed under section 3575 constituted a violation of the eighth amendment prohibition against cruel and unusual punishment.[81] The court dismissed this argument summarily, finding that the eighth amendment only barred sentences "grossly disproportionate to the severity of the crime."[82] The fact that existing sentences remained to be served was insignificant; absent legislative irrationality, the state retained the power to punish lawbreakers for each transgression.[83]

4. Vagueness

Next, Schell argued that the definition of "dangerous" in section 3575 was unconstitutionally vague. The Tenth Circuit joined several sister circuits in rejecting this argument.[84] Even though Congress might have used more precise language, congressional imprecision did not in itself render the statute unconstitutionally vague.[85] The statute required trial judges to consider the defendant's propensity to engage in criminal activity.[86] Trial

76. 692 F.2d at 674.

77. *Id. See also* United States v. Bailey, 537 F.2d 845, 846-47 (5th Cir. 1976), *cert. denied*, 429 U.S. 1051 (1977). *But see* United States v. Fatico, 458 F. Supp. 388, 401 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980) (enhanced sentence permissible under section 3575 because defendant had long-standing connection with New York organized crime "family").

78. 692 F.2d at 675.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* The court cited Rummel v. Estelle, 445 U.S. 263 (1980) for support, and speculated that *Rummel* might permit any non-capital penalty for egregious felony convictions. *See* 692 F.2d at 675.

83. 692 F.2d at 675.

84. *See* United States v. Williamson, 567 F.2d 610, 615 (4th Cir. 1977); United States v. Bowdach, 561 F.2d 1160, 1175-76 (5th Cir. 1977); United States v. Neary, 552 F.2d 1184, 1194 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977); United States v. Stewart, 531 F.2d 326, 331-32, 335-37 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976).

85. 692 F.2d at 675 (citing United States v. Powell, 423 U.S. 87 (1975)).

86. *See* 18 U.S.C. § 3575(f) (1982).

judges, presumably familiar with predictive processes through experience with normal sentencing and bail proceedings, could therefore interpret the definition of "dangerous" without having to "guess at its meaning and differ as to its application."[87] Because section 3575(f) therefore met the minimum standards for notice,[88] it satisfied due process requirements.[89]

5. Evidentiary Standard and Sentencing Proceedings

Finally, in the only challenge generating a dissent,[90] Schell attacked the statute's evidentiary standards. The DSO statute permits a defendant to be found "dangerous" and a "special offender" upon proof by a "preponderance of the information."[91] In a split decision, Judge McKay dissenting, the Tenth Circuit panel held that the preponderance standard satisfies a convicted defendant's due process rights, and rejected Schell's challenge.[92] The majority's analysis of the Supreme Court's opinions addressing the due process aspects of sentencing led it to conclude that the Court had not articulated the evidentiary standard constitutionally required for enhanced sentencing proceedings.[93] In *Specht v. Patterson*[94] the Court recognized that enhanced sentencing proceedings implicated significant due process concerns, and held that a defendant subject to enhanced sentencing was entitled to procedural protections not required when sentencing in the normal range.[95] Because *Specht* had not considered the evidentiary standard question,[96] however, the majority proceeded to analyze Schell's constitutional challenge by applying the interest balancing methodology underlying mod-

87. 692 F.2d at 675. Other circuits have used similar reasoning in rejecting vagueness attacks on section 3575(f). For instance, the Seventh Circuit has stated:

> [W]e [do not] find that the term dangerous is overly broad or vague for the purposes of sentencing. . . . Factors routinely considered by a sentencing judge are the defendant's past record, the probation officer's report, the nature of the present offense and the defendant's attitude. . . . Likelihood of future criminality and the potential danger to society are determinations implicit in sentencing decisions. The concept of dangerousness as defined in § 3575 is a verbalization of considerations underlying any sentencing decision.

United States v. Neary, 552 F.2d 1184, 1194 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977).

88. *See* United States v. Powell, 423 U.S. 87 (1975); Connally v. General Construction Co., 269 U.S. 385 (1926).

89. 692 F.2d at 675.

90. *See id.* at 679 (McKay, J., concurring in part and dissenting in part).

91. 18 U.S.C. § 3575(b) (1982). *See supra* note 61.

92. 672 F.2d at 679.

93. *Id.* at 677. The Court has held that due process requires use of the "beyond a reasonable doubt" standard in proceedings leading to criminal conviction. *In re* Winship, 397 U.S. 358 (1970). Conversely, the Court has indicated that the preponderance standard is constitutionally permissible when a court is sentencing within the range prescribed for a particular crime. *Cf.* Williams v. New York, 337 U.S. 241 (1949) (no significant due process concerns at sentencing). The Tenth Circuit characterized an enhanced sentencing proceeding as a "halfway house" between a criminal proceeding and a normal sentencing proceeding. 692 F.2d at 676. Because the enhanced sentencing power could not be invoked without making factual findings not required for conviction, *Williams* was not controlling. Similarly, because the proceeding did not involve a separate criminal conviction, *Winship* was not controlling. Thus, the Tenth Circuit was required to engage in an independent analysis. 692 F.2d at 676.

94. 386 U.S. 605 (1967).

95. *Id.* at 609-10.

96. The precise issue in *Specht* was whether a defendant in an enhanced sentencing proceeding was entitled to an adversarial hearing at the enhanced sentencing phase of the prosecution. *Id.* at 608.

ern due process jurisprudence.[97]

Interest balancing methodology requires three inquiries: 1) determining the nature of the affected private interest; 2) evaluating the risk of erroneous deprivation of that interest through existing procedures and the probable value of alternate procedures in preventing such erroneous deprivation; and 3) assessing the nature of the governmental interest.[98] When the calculus of these inquiries balances in favor of a private party, existing procedures are constitutionally inadequate.[99]

The majority recognized that defendants have a liberty interest which is affected by an enhanced sentence, although they did not engage in a meaningful analysis of the nature of this interest.[100] The majority also recognized that evidentiary standards were procedural devices for allocating the risk of error in judicial proceedings.[101] The "reasonable doubt" standard allocates virtually all the risk of error to the government; the "clear and convincing" standard allocates most of the risk to the government; the "preponderance" standard essentially allocates the risk equally.[102] The final elements injected into the due process equation were the government's interests in protecting society and in deterring citizens from the criminal path.[103]

Relying on three factors, the majority concluded that the requirements of due process were satisfied by use of the preponderance standard. First, a defendant in a DSO proceeding is statutorily entitled to the adversarial hearing explicitly required by *Specht*.[104] Second, given the subjective nature of a finding of "dangerousness," the reasonable doubt standard would, as a practical matter, lead to total subordination of the government's interests.[105] Finally, Congress had openly considered the constitutional issue and decided on the preponderance standard; that decision was entitled to great weight.[106] In light of the above, the majority concluded that the parties' interests were roughly equal, and that section 3575's preponderance standard—which divides the risk of erroneous deprivation equally between the parties to a proceeding[107]—adequately satisfied the demands of due process.[108]

Judge McKay, in his dissent, agreed that *Specht* had not resolved the

97. 692 F.2d at 678 (citing Addington v. Texas, 441 U.S. 418 (1979)). *See also* Mathews v. Eldridge, 424 U.S. 319 (1976); Board of Regents v. Roth, 408 U.S. 564 (1972). The Court's interest-balancing approach has been criticized as giving lip service to individual due process rights and turning a constitutional check on governmental authority into a mechanistic exercise, Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975), but nonetheless remains controlling when adjudicating due process challenges.

98. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

99. *See id.*

100. 692 F.2d at 678.

101. *Id.* at 676.

102. *Id.* at 676 (citing Addington v. Texas, 441 U.S. 418 (1979)).

103. 692 F.2d at 678. *See also Addington*, 441 U.S. at 429.

104. *Id.* at 677. *See* 18 U.S.C. § 3575(b) (1982).

105. 692 F.2d at 679.

106. *Id.* (citing Fullilove v. Klutznick, 448 U.S. 448, 472 (1980)).

107. Addington v. Texas, 441 U.S. 418, 423 (1979).

108. 692 F.2d at 679.

due process issue raised by Schell.[109] Balancing the interests involved, however, led the dissent to conclude that due process required, at a minimum, the use of a clear and convincing standard in a DSO proceeding.[110]

Divergence from the majority's conclusion stemmed from Judge McKay's careful characterization of the interests involved. Subjecting a defendant to an enhanced sentencing proceeding creates the possibility that the liberty interest not extinguished by the original proceeding can be lost.[111] This residual liberty interest, which is in freedom from confinement not prescribed by a criminal conviction, is an interest of "high order."[112] Consequently, due process concerns are sharply implicated when the legislature attempts to impose an enhanced sentence based on facts not adduced as part of the criminal conviction; in that situation the legislature is trying to deprive a defendant of a portion of his liberty interest not extinguished by the criminal conviction simpliciter.[113] Further, the government's interests in the DSO proceeding are not solely adversarial. The government's interests are not limited to protecting society from the effects of dangerous criminals; the government also has an interest in "protecting persons who are not dangerous from imprisonments."[114] *Both* interests are of high order.[115]

Turning to an analysis of the preponderance standard, the dissent found two serious problems. First, although the standard would advance the government's interest in protecting society, through causing overinclusive application of section 3575, overinclusiveness would generate wrongful imprisonment, thereby "undermining the 'moral force' of the criminal law."[116] Second, the preponderance standard's overinclusiveness would affect primarily those defendants not actually falling within the statute's scope, thereby magnifying the number of erroneous deprivations.[117]

Recognizing the proof problems of a reasonable doubt standard in the context of a statute requiring a subjective determination,[118] Judge McKay would have required a clear and convincing standard.[119] This standard would advance the government interests by eliminating overinclusiveness

109. *Id.* at 680 (McKay, J., dissenting).

110. *Id.* at 684.

111. *Id.* at 681. Judge McKay read the Supreme Court's sentencing decisions to draw a distinction between that portion of a defendant's liberty interest extinguished by the original conviction and the defendant's residual liberty interest. *Id. Cf.* Vitek v. Jones, 445 U.S. 480, 493 (1980) (transfer of prisoner to mental hospital implicated due process concerns because such transfer not within the range of confinement created by prison sentence).

112. 692 F.2d at 683 (McKay, J., dissenting). *Accord In re* Winship, 397 U.S. 358, 363 (1970); *In re* Gault, 387 U.S. 1, 50-51 (1967).

113. 692 F.2d at 681-82 (McKay, J., dissenting). Judge McKay limits the original deprivation to that range of confinement justified solely by the criminal conviction. Any additional confinement constituted an encroachment on a defendant's residual liberty interest. *Id.* Judge McKay's analysis does not bar the legislature from creating increased sentencing ranges, as the legislatively chosen range of sentencing for the criminal conviction simpliciter defines the residual liberty interest. *Id.* at 681.

114. *Id.* at 684.

115. *Id.*

116. *Id.*

117. *Id.* at 683.

118. *Id.* at 684.

119. *Id.*

while simultaneously providing the defendant with sufficient protection against erroneous deprivation of a residual liberty interest of fundamental importance.[120]

C. *Analysis of* Schell

Judge McKay and the majority (Judges Doyle and Logan) have separate understandings of the necessary procedural due process safeguards to be accorded. This results from their different assessments of the liberty interests at stake.[121] Before that conflict can be analyzed, however, it is necessary to consider the initial premise underlying both opinions, which is that *Specht* does not control the resolution of Schell's challenge.

1. *Specht* and Due Process at Enhanced Sentencing Proceedings

In an early decision, *Williams v. New York*,[122] the Supreme Court approved of relaxed procedural rigor in the context of ordinary sentencing proceedings. *Williams* involved an appeal from a death sentence which had been given based on background information in a presentence report.[123] The defense had no opportunity at trial to cross-examine the probation authorities or the parties relied on in developing the fatal document.[124] The Court upheld this procedure, distinguishing the finding of guilt from the imposition of punishment.[125] Adversarial protections at sentencing were deemed unnecessary because the convicted defendant did not need the protections against caprice adversarial procedures provided for the merely indicted defendant.[126] Moreover, the sentencing judge was entitled to all information regarding the defendant in order to make the most intelligent imposition of sentence.[127] Due process therefore did not require any procedural protections, at least beyond an opportunity to object to the sentence.

The next decision addressing due process requirements at sentencing was *Specht*. *Specht* involved an enhanced sentencing statute[128] similar to section 3575, in that both statutes required a finding of fact ("dangerousness") not required for conviction on the underlying criminal charge.[129] The Supreme Court held that invoking the Colorado statute involved making a new and separate criminal charge.[130] Thus, the defendant in such a proceeding was entitled to the "full panoply" of procedural protections due process deemed essential for a fair trial.[131]

120. *Id.*

121. *Compare supra* notes 100-108 and accompanying text (majority opinion) *with supra* notes 109-117 and accompanying text (dissenting opinion).

122. 337 U.S. 241 (1949).

123. *Id.* at 244.

124. *Id.* at 244-45.

125. *Id.* at 246.

126. *See id.* at 247.

127. *See id.* at 249-51.

128. COLO. REV. STAT. §§ 39-19-1 to -10 (1963), *repealed*, Act of May 21, 1972, § 8, 1972, Colo. Sess. Laws p. 268.

129. *See* COLO. REV. STAT. § 39-19-1 (1963), *repealed*, Act of May 21, 1972, § 8, 1972, Colo. Sess. Laws p.268; 18 U.S.C. § 3575(f) (1982).

130. Specht v. Patterson, 386 U.S. 605, 610 (1967).

131. *Id.* at 609-10 (quoting Gerchman v. Maroney, 355 F.2d 302, 312 (3d Cir. 1966)).

An expansive reading of *Specht* would entitle those accused under section 3575 to what the Supreme Court recognizes as one of the most fundamental due process protections available for criminal defendants: the reasonable doubt standard.[132] Logically, if *Specht* incorporates the "full panoply" of due process protections, the preponderance of the evidence standard in the DSO statute is patently unconstitutional. *Specht*, however, for several reasons, has not been read so broadly.

First, *Specht* predates the cases establishing the due process balancing test, making it inappropriate to extend *Specht* without engaging in balancing analysis.[133] Additionally, while *Specht* explicitly required some procedural due process protections, the beyond the reasonable doubt standard was not mentioned.[134] Further, the fact that additional factfinding is required in an enhanced sentencing proceeding does not seem determinative, in light of the fact that *Williams* (which was explicitly reaffirmed in *Specht*)[135] permits a judge to engage in additional factfinding.[136] Finally, the Court has recognized the due process fundamentality of the reasonable doubt standard in the context of a defendant's conviction proceeding, not in the context of a post-conviction proceeding.[137] Although the foregoing clearly does not settle the question, until the Supreme Court actually decides the issue it appears that both the majority and the dissent properly rejected *Specht* and *Williams* as controlling precedent.[138]

2. Weighing the Interests

It is apparent that the defendant in a DSO proceeding has a substantial liberty interest: his residual freedom.[139] In evaluating the degree of proof required, it is important to remember Justice Brennan's statement that "[t]he procedure by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule to be applied. And the more important the rights at stake the more important must be the

132. *See In re* Winship, 397 U.S. 358 (1967).

133. *Cf.* 692 F.2d at 680 (McKay, J., dissenting) (Supreme Court has developed "more disciplined method of due process analysis" since *Specht*).

134. *Specht* required a hearing, assistance of counsel, compulsory process, cross-examination of adverse witnesses, written findings of fact, and appeal from an adverse decision. 386 U.S. at 610. These protections are all included in a DSO proceeding. *See* 18 U.S.C. § 3575(b) (1982). It should be noted, however, that the evidentiary standard question was not before the Court in *Specht*. *See supra* note 96.

135. *Specht*, 386 U.S. at 608.

136. *See generally* Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 HARV. L. REV. 356 (1975).

137. *See In re* Winship, 397 U.S. 358 (1967). *Winship*'s concern with due process at the original conviction stage of the criminal justice process is demonstrated by its citation to that portion of *In re* Gault, 387 U.S. 1 (1967), which held that due process rights are invoked in a proceeding leading to confinement. *See Winship*, 397 U.S. at 365-66 (citing *Gault*, 387 U.S. at 50-51). *Winship* did not cite *Specht*, perhaps indicating that the Court perceives a distinction between post-conviction and pre-conviction proceedings. Additionally, note that *Williams* drew the pre-/post-conviction distinction. 337 U.S. at 246.

138. *Cf.* Note, *supra* note 136, at 373 (precise answers to due process requirements at enhanced sentencing proceedings not deducible from Court's decisions "as a matter of pure logic").

139. *See supra* notes 111-13 and accompanying text.

procedural safeguards surrounding those rights."[140]

The selection of a burden of proof depends on the societal interests which are pitted in certain types of litigation. For instance, the preponderance standard (more probable than not) is used in civil cases, where the law considers plaintiffs and defendants equal, and considers the possibility of an erroneous verdict without grave consequences.[141] When moral issues are involved in a civil proceeding, such as libel, the Court requires a standard which is stricter than the preponderance standard—clear and convincing evidence.[142] In deportation, denaturalization, and expatriation cases, where fundamental interests are at stake, the more exacting, clear, unequivocal and convincing evidence standard is also utilized.[143] Thus, the clear and convincing standard generally applies in situations where "[t]he various interests of society are pitted against restrictions on the liberty of the individual."[144] Finally, in criminal proceedings, which involve immense interests, the beyond a reasonable doubt standard is required.[145]

From this recitation, it is obvious that the defendant's residual freedoms can be classified as significant, throwing doubt on the propriety of section 3575's preponderance standard. It would be virtually impossible to prove an individual "dangerous" beyond a reasonable doubt, however. The most reasonable solution to the dilemma was articulated by Judge Friendly in *Hollis v. Smith*.[146]

*Hollis* involved an enhanced sentencing proceeding not unlike that in *Specht*. Following a cursory psychiatric examination the judge found Hollis dangerous to society and sentenced him to an indeterminate term.[147] The appellate court recognized that a finding of "dangerousness" based on psychiatric evidence is both onerous and uncertain; given Hollis' significant liberty interest, the judge should have used a "clear, unequivocal and convincing" standard.[148] The dissent in *Schell* cites *Hollis* and, echoing *Hollis'* concern for a defendant's liberty interest, found the clear and convincing evidence standard necessary in DSO proceedings.[149] Given the defendant's fundamental interest, and the fact that the preponderance standard's overinclusiveness causes the risk of erroneous deprivation to fall most significantly on the "non-dangerous" defendant, the dissent's position more properly recognizes the due process protections required by the DSO proceeding.

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140. Speiser v. Randall, 357 U.S. 513, 520-21 (1958).

141. *See supra* notes 101-03 and accompanying text.

142. *See* Addington v. Texas, 441 U.S. 418, 423-24 (1979). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 333-32 (1974) (libel requires proof by clear and convincing standard); 9 WIGMORE, EVIDENCE, § 2498, p. 329 (3d. ed. 1940) (fraud and undue influence should be proven by clear and convincing amount of evidence).

143. *See, e.g.*, Woodby v. INS, 385 U.S. 276 (1966); Baumgartner v. United States, 322 U.S. 665 (1944).

144. *In re* Ballay, 482 F.2d 648, 662 (D.C. Cir. 1973).

145. *In re* Winship, 397 U.S. 358 (1970).

146. 571 F.2d 685 (2d Cir. 1978).

147. *Id.* at 688-89.

148. *Id.* at 695-96.

149. 692 F.2d at 684-85 (McKay, J., dissenting).

## III. THE MENS REA REQUIREMENT FOR FOOD STAMP FRAUD

In *United States v. O'Brien*[150] the Tenth Circuit, in a case of first impression,[151] set forth the elements necessary for conviction under 7 U.S.C. § 2024(b),[152] the criminal fraud provision of the Food Stamp Act.[153] Section 2024(b) provides that "whoever knowingly . . . acquires [food stamp] coupons" in any unauthorized manner has committed a felony.[154] The issue on appeal was whether this section required proof that the defendant knew that the manner of acquisition was not authorized by the Food Stamp Act.[155] The Tenth Circuit agreed with the defendants' contention that to support a conviction, the trial court must instruct the jury that the defendant knew the manner in which the food stamps were acquired was not authorized by the statute.[156]

### A. *The Facts*

Bonnie Sue O'Brien was contacted by a friend who asked Mrs. O'Brien if she wanted to purchase some food stamps.[157] Unknown to Mrs. O'Brien, her friend (Clark) was acting as an informant.[158] Mrs. O'Brien eventually gave Clark and her companion (an undercover agent) $220 in exchange for $500 of food coupons.[159] This conduct resulted in the first charge against Bonnie O'Brien.[160]

Several weeks later, Clark and the undercover agent contacted Paul O'Brien (Bonnie's husband) and asked whether he would exchange twenty tablets of phenmetrazine for $500 in food stamps.[161] O'Brien agreed; after obtaining the drugs, the proposed transaction was made.[162] Although the undercover agent stated that Bonnie O'Brien actually effectuated the exchange, charges were brought against both O'Briens.[163]

At the trial the jury could not reach a verdict on the first count, and the judge declared a mistrial.[164] The same jury, however, returned with a guilty verdict against Mr. and Mrs. O'Brien on the second count.[165] As noted above, the O'Briens then appealed the adequacy of the jury instructions.

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150. 686 F.2d 850 (10th Cir. 1982).

151. *Id.* at 852.

152. 7 U.S.C. § 2024(b) (1982). This section reads in relevant part: "[W]hoever knowingly . . . acquires [food stamp] coupons . . . in any manner not authorized by this chapter or the regulations issued pursuant to this chapter shall, if such coupons . . . are of a value of $100 or more, be guilty of a felony. . . ." *Id.* § 2024(b)(1).

153. 7 U.S.C. §§ 2011-2029 (1982).

154. *See supra* note 152.

155. 686 F.2d at 852. The appeal arose from the trial court's failure to instruct the jury that an element of the crime was knowledge of the unauthorized manner of acquisition. *Id.*

156. *Id.*

157. *Id.* at 851.

158. *Id.*

159. *Id.*

160. *Id.* This charge resulted in a mistrial.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

B. *The Holding*

The Tenth Circuit examined the language of the statute and found that it was ambiguous because the adverb "knowingly" could be read to modify either the word "acquire" or the phrase "acquire in a manner not authorized."[166] Judge McWilliams, who wrote the opinion, first examined the legislative history of section 2024(b) and found it unhelpful because the issue of knowledge of unauthorized acquisition was never discussed.[167] Similarly, earlier versions of the Food Stamp Act did not prove to be of assistance in clarifying the statute.[168] Lacking helpful legislative history, the Tenth Circuit applied the maxim of statutory construction that criminal statutes should be construed against the government and in favor of the accused.[169] Additionally, because the offense involved a felony, the court read the statute as requiring criminal intent.[170]

Utilizing these rules, the panel held that reversible error was committed when the trial court failed to instruct the jury that knowledge that the manner of acquisition was in violation of statute or regulation constituted an essential element of the crime.[171] The significance of the *O'Brien* decision is that it is the first reported decision to delineate the mens rea element of section 2024(b).

## IV. THE NECESSITY DEFENSE AND POLITICAL PROTEST: ROCKY FLATS SIT-IN CASE

In *United States v. Seward*,[172] the court considered the requisite showing of justification necessary to sustain the defense of "necessity" or "choice of evils" in the political protest context.

A. *The Facts*

Several thousand people were permitted to use an isolated ten-acre portion of the Rocky Flats Nuclear Plant site in Jefferson County, Colorado on April 28, 1979 for a peaceful and orderly demonstration during which no arrests occurred.[173] On the next day, three groups of protestors returned; 283 members of these groups were arrested when they crossed a painted line at the east access gate of the plant, which indicated the area of restricted access to the government property.[174] The protesters were symbolically resisting

166. *Id.* at 851-52 & n.3. *See also* W. LA FAVE & A. SCOTT, *supra* note 3, at § 27 (discussing, in an analogous situation under "blue sky" laws, problem of determining which clauses were modified by adverb "knowingly").

167. 686 F.2d at 852.

168. *Id.* at 852-53.

169. *Id.* at 853. This is a markedly different approach than that taken by the Tenth Circuit in construing 18 U.S.C. § 2113(b) (1982), the Federal Bank Crimes statute. *See supra* notes 1-19 and accompanying text.

170. 686 F.2d at 853.

171. *Id.* at 853-54.

172. 687 F.2d 1270 (10th Cir. 1982), *cert. denied sub nom.* Ahrendt v. United States, 103 S. Ct. 789 (1983).

173. *Id.* at 1271-72.

174. *Id.* at 1272. The defendants were charged with trespass on an installation of the Nuclear Regulatory Commission in violation of 42 U.S.C. § 2278a (1976) and 10 C.F.R. §§ 860.1-

the presence of the plant, which they considered a threat to community health and well-being because of the nuclear research and development activities performed there.[175]

Following arraignment on trespass charges, the prosecution filed a motion in limine seeking to prevent the defendants from presenting evidence at trial supporting common-law "necessity" defenses including justification, self-defense, defense of others, and defense of property.[176] At the hearing on this motion the trial court ordered the defense to submit written offers of proof substantiating the common law defenses sought to be excluded by the prosecution.[177] Numerous offers were presented, the defendants proffering expert testimony on the effects of radiation, the risk of leaking radioactive material, the existing levels of soil contamination around the Rocky Flats Plant, and the lack of viable relief through the political system.[178]

On June 7, 1979, all of the trial judges assigned to the cases[179] joined in an order placing strict requirements on the use of the common-law necessity defenses. The trial judges' order stated that to use the necessity defenses, the defendant had to make an acceptable offer of proof at trial.[180] The offer had to show: 1) a direct causal relationship between the defendant's actions and the cessation of the harmful activity; 2) the defendants were preventing criminal conduct by the government; 3) the government's criminal act was occurring in the defendants presence; and 4) no alternative short of criminal activity was available to halt the objectionable activity at Rocky Flats.[181] Although made in accordance with this order, the offers of proof were uniformly denied.[182] On appeal, the defendants challenged this action.[183]

### B. *The Decision*

The Tenth Circuit Court of Appeals affirmed the trial courts' assault on the necessity defenses, finding that several essential elements were not satisfied by the offers of proof.[184] The court defined the elements of the defense as 1) the absence of a legal alternative to criminal conduct; 2) imminence of harm, and 3) proof of a causal relationship between the criminal conduct

.8 (1983). 687 F.2d at 1271. For a discussion of an administrative law challenge to the trespass convictions, see *Administrative Law, Tenth Annual Tenth Circuit Survey*, 61 DEN. L.J. 109, 110-17 (1984).

175. 687 F.2d at 1274, 1276.

176. *Id.* at 1273. It is not clear whether all the defenses were properly termed "necessity"; the defenses of necessity are similar to duress defenses but conceptually distinct. *See* W. LAFAVE & A. SCOTT, *supra* note 3, at § 50, at 383.

177. 687 F.2d at 1273.

178. *Id.*

179. The defendants were divided into several groups of 15 to 20 for trial; on appeal, the appellants were similarly grouped. *Id.* at 1272.

180. *Id.* at 1273.

181. *Id.* at 1273-74. The trial court supported its order by citing United States v. The Diana, 74 U.S. (7 Wall.) 354 (1869); United States v. Simpson, 460 F.2d 515 (9th Cir. 1972); United States v. Cullen, 454 F.2d 386 (7th Cir. 1971); and United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969).

182. 687 F.2d at 1274.

183. *Id.*

184. *Id.* at 1275.

and avoidance of the imminent harm.[185] The appellate court saw the availability of another, legal course of action—political action—as the primary impediment to the necessity defenses.[186] The Tenth Circuit reasoned that the necessity defense is based on a real emergency confronting an individual who then has no choice but to perform a criminal act.[187] In the *Seward* case this "indispensable element" was absent.[188] Therefore, the trial court did not abuse its discretion in denying the defense.

### C. *The "Necessity" Defense and Political Protests*

The application of the necessity defense involves an examination of the utility of the two acts confronting the defendant: the criminal act is weighed against the harm avoided.[189] In the eyes of the *Seward* defendants, the negative effects of criminal trespass were weighed against the effect of radioactive materials on the persons and environment near the plant. Given this balance, the *Seward* defendants felt impelled to break the law. The cases and commentators, however, stress that the availability of a third course of action will preclude the defense when that third course of action provides an effective means of preventing the criminal harm without the necessity of lawbreaking. The *Seward* court assumed that an effective course of action was available in the political mechanism. Of course, this reflects a judgment on the severity and immediacy of the harm to persons and the environment which might result *while* the defendants pursue a political course of action. It is probably more appropriate for the court to look to the element of causation as justification for precluding the defense: the defendants' trespass on a small corner of the property did not significantly alter the course of plant operation. This more objective criterion is preferable because courts deal with causation on a daily basis. The effect of nuclear research on persons and the environment is far more speculative.

## V. ENTRAPMENT DEFENSE: ADMISSION OF CRIME CHARGED REMAINS A PREREQUISITE

In *United States v. Pride*,[190] the defendant Pride was convicted on all three counts of the indictment: count one, unlawfully transporting a female from New Mexico to Texas for the purpose of prostitution;[191] count two,

185. *Id.* at 1275 (citing State v. Marley, 54 Hawaii 450, 509 P.2d 1095 (1973)).

186. 687 F.2d at 1275. The offers of proof had attempted to show the futility of resort to the political process; the Tenth Circuit found those offers insufficient. "The references to attempted political action were inadequate and *only referred to attempts by other persons*." *Id.* (emphasis supplied).

187. *Id.* at 1276.

188. *Id.*

189. *See generally* W. LAFAVE & A. SCOTT, *supra* note 3, at § 50.

190. No. 80-1909 (10th Cir. Aug. 3, 1982).

191. *Id.* at 2. Pride was charged with violating the Mann Act, 18 U.S.C. § 2421 (1982), which provides in part:

> Whoever knowingly transports in interstate or foreign commerce, or in the District of Columbia or in any Territory or Possession of the United States, any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral

unlawful possession of cocaine with the intent to distribute;[192] and count three, unlawful distribution of cocaine to Robin Phillips.[193] The evidence showed that Pride had transported Robin Phillips, along with other prostitutes, from New Mexico to Texas for the purpose of having the women engage in prostitution. After returning to New Mexico, Phillips reported Pride's activities to the Albuquerque Police Department and agreed to act as an informant.[194] Subsequently, Phillips and Pride had a meeting where they used cocaine. At the trial the testimonies of Phillips and Pride conflicted as to who provided the cocaine, each claiming the other had furnished the controlled substance.[195] Nonetheless, Pride took the fall.

On appeal, Pride contended that his convictions on the drug charges should be reversed because the district court failed to give an instruction on entrapment.[196] Generally, entrapment is available as a defense only when the defendant admits commission of the crime.[197] Pride apparently attempted to persuade the court that his admission that he had used or possessed cocaine provided by Ms. Phillips was sufficient to fulfill this requirement.[198] He further asserted that it would be "wholly inconsistent with his testimony and generally absurd" for the defendant to be required to admit to the crimes as charged in light of his theory of defense.[199]

The Tenth Circuit, per Judge McWilliams, first noted that although several courts have departed from the general rule and permitted an accused to rely upon a defense of entrapment while denying commission of the acts constituting the charged offenses,[200] a "vast majority" of courts hold that the accused may not assert entrapment without also admitting the offense as charged.[201] Citing *United States v. Freeman*,[202] a Tenth Circuit case holding

practice. . . [s]hall be fined not more than $5,000 or imprisoned not more than five years, or both.

192. No. 80-1909, slip op. at 2. This charge related to violation of 21 U.S.C. § 841(a)(1) (1982) which provides in part: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

193. No. 80-1909, slip op. at 2. This count also charged a violation of 21 U.S.C. § 841(a)(1) (1982).

194. No. 80-1909, slip op. at 3. Phillips was given a tape recorder for the purpose of obtaining evidence. Pride could not prove he was prejudiced by the quality of the tape recording or the government's delay in delivering a copy of the tape to his attorney. The Tenth Circuit therefore found no abuse of discretion in admitting the tape. *Id.* at 5-7.

195. *Id.*

196. "Entrapment occurs when the criminal design originates with agents of the government who implant in the mind of an innocent person the disposition to commit the offense." United States v. Gusule, 522 F.2d 20, 23 (10th Cir. 1975), *cert. denied*, 425 U.S. 976 (1976). Pride did not appeal his conviction under the Mann Act.

197. *See, e.g.*, Padilla v. United States, 421 F.2d 123 (10th Cir. 1970).

198. *See* No. 80-1909, slip op. at 3.

199. Appellant's Reply Brief at 2, United States v. Pride, No. 80-1909 (10th Cir. Aug. 3, 1982).

200. No. 80-1909, slip op. at 4 n.3 (citing United States v. Greenfield, 554 F.2d 179, 182 (5th Cir. 1977), *cert. denied*, 439 U.S. 866 (1978); United States v. Demma, 523 F.2d 981, 982 (9th Cir. 1975); Hansford v. United States, 262 F.2d 68, 70 (4th Cir. 1958) (per curiam)).

201. No. 80-1909, slip op. at 4 n.3 (citing United States v. Nicoll, 664 F.2d 1308, 1314 (5th Cir. 1982); United States v. Arnese, 631 F.2d 1041, 1046 (1st Cir. 1980); United States v. Brooks, 611 F.2d 614, 618 (5th Cir. 1980); United States v. Shoup, 608 F.2d 950, 964 (3d Cir. 1979); United States v. Garcia, 562 F.2d 411, 418 (7th Cir. 1977)). Among Tenth Circuit cases holding

that the defense of entrapment was inconsistent with denial of transacting a drug sale with government agents, the court refused to depart from the majority view.[203] *Pride* therefore reaffirms that in the Tenth Circuit the defense of entrapment is not available to a defendant denying commission of the crime charged. In reaffirming its previous rule, the court eschewed comment upon the obfuscation and highly prejudicial effect a defendant's admission to the crimes charged might have upon juror consideration of the defendant's alternate theories of defense.

## VI. DISTRICT COURT PROCEDURAL FLEXIBILITY IN PROBATION PROCEEDINGS

*Herzfeld v. United States District Court*[204] was an appeal arising from the aftermath of the mail fraud conviction of Trenton H. Parker in connection with numerous fraudulent tax shelter investment schemes. Mr. Parker pled guilty to mail fraud under a plea agreement which required him to transfer approximately six million dollars, previously in a Bahamian bank, to the registry of the trial court.[205] This money was generated by Parker's "Gold Tax Shelter Investment Program" (Gold Program), which was the fraudulent investment program leading to Parker's mail fraud conviction.[206] The district court ordered this money paid as restitution, and appointed a receiver to administer the fund.[207] Two separate groups of plaintiffs maintaining civil fraud actions against Parker based on the Gold Program then brought suit seeking to have the receivership dissolved.[208] The United States District Court for the District of Colorado refused to invalidate the receivership and, pursuant to 28 U.S.C. § 1292,[209] certified to the Tenth Circuit the question of whether a federal district court has the power, in a criminal proceeding, to create a receivership to effect restitution.[210]

On appeal, the civil plaintiffs argued that in the absence of express authority the district court had no jurisdiction to create the receivership.[211] No specific statutory provisions prohibiting the creation of a receivership in a matter of criminal restitution were tendered to the court.[212]

The Tenth Circuit held that implicit in both a district court's statutory authority to order restitution as a condition of probation[213] and the latitude

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the same are United States v. Smith, 629 F.2d 650, 652-53 (10th Cir.), *cert. denied*, 449 U.S. 994 (1980) and Munroe v. United States, 424 F.2d 243, 244 (10th Cir. 1970).

202. 412 F.2d 1181 (10th Cir. 1969).

203. No. 80-1909, slip op. at 4-5.

204. 699 F.2d 503 (10th Cir.), *cert. denied*, 104 S. Ct. 70 (1983).

205. *Id.* at 504.

206. *Id.*

207. *Id.*

208. *Id.* The two groups included a group of Colorado plaintiffs with a judgment against Parker and a group of New Jersey plaintiffs maintaining a class action against Parker. *Id.*

209. 28 U.S.C. § 1292 (1982). This section permits a district court to certify an interlocutory appeal to an appellate court. *Id.* § 1292(b).

210. 699 F.2d at 505.

211. *Id.*

212. *See id.*

213. *See* 18 U.S.C. § 3651 (1982), which provides in pertinent part: "While on probation and among the conditions thereof, the defendant—. . . may be required to make restitution or

provided by Fed. R. Crim. P. 57(b)[214] was the authority to take those actions necessary[215] or appropriate[216] to effect restitution. In reaching this conclusion the court relied upon two distinct analyses. The first was grounded in the premise that any legislative grant of judicial power "carries with it the right to use the means and instrumentalities necessary to the beneficial exercise of that power."[217] Because a receivership might be necessary to effect restitution to numerous unknown victims, the district court's action was not inherently void.[218] The Tenth Circuit's decision did not rest on that narrow ground, however. The court noted that Congress had never detailed the manner in which restitution could be effected, but had nonetheless granted restitutionary power.[219] Congress' legislative intent in permitting restitution must necessarily have been to create sufficient flexibility and authority to utilize practical means useful in accomplishing restitution.[220] Where large sums of money are involved, the "practical needs" of the system justify creation of a receivership.[221] The Tenth Circuit carefully limited its holding, however, by stating that because the receiver was under the control and direction of the district court there could be no suggestion that the establishment of the receivership constituted an unlawful delegation of authority to private parties.[222]

Finally, the court rejected the civil plaintiffs' contentions that they were equitably entitled to the fund because of their diligence in bringing Parker to justice and discovering the fund.[223] The receivership and restitution were an integral part of Parker's plea bargain arrangement.[224] The concern on appeal was the validity of the manner chosen to effect that arrangement, not equitable entitlement to the fund.[225] Accordingly, the lower court's power to create the receivership was affirmed.[226]

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reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had. . . ."

214. FED. R. CRIM. P. 57(b) provides: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

215. 699 F.2d at 505.

216. *Id.* at 506.

217. *Id.* at 505 (citing Blue Cross Ass'n v. Harris, 622 F.2d 972, 978 (8th Cir. 1980)). *See also* Daly v. Stratton, 326 F.2d 340, 342 (7th Cir. 1964).

218. *See* 699 F.2d at 505.

219. *Id.*

220. *Id.* at 506.

221. *Id.* The court supported its conclusion by noting that unique probation orders entered under 18 U.S.C. § 3651 (1982) have been upheld by circuit courts. *Id.* (citing United States v. Lawson, 670 F.2d 923 (10th Cir. 1982); United States v. Pierce, 561 F.2d 735 (9th Cir.), *cert. denied*, 435 U.S. 923 (1977); United States v. Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975)).

222. 699 F.2d at 506.

223. *Id.* at 507.

224. *Id.*

225. *Id.*

226. *Id.*

## VII. LIMITING JUDICIAL DISCRETION IN CREATIVE SENTENCING AND SYMBOLIC RESTITUTION

### A. *Limiting "Creative Sentencing":* United States v. Prescon Corp.

In *United States v. Prescon Corp.*[227] the defendants Prescon Corporation (Prescon) and VSL Corporation (VSL) pled nolo contendere to charges of bid rigging to eliminate competition on commercial construction projects in Colorado and nine neighboring states,[228] and mail fraud in connection with the submission of the rigged bids.[229] The trial court sentenced Prescon and VSL to unsupervised probation and fined the defendants $252,000 and $302,000, respectively.[230] The sentence provided, however, that the execution of these fines would be suspended if the corporate defendants deposited, respectively, the sums of $50,000 and $75,000 "into the registry of the Court, to be disbursed to such community agencies as selected by the Chief Probation Officer with the approval of the Court."[231] The district court expressed its hope that the funds would be used for community programs aimed at decreasing crimes, but did not specifically require the funds be used for that purpose.[232]

The government, claiming the sentence to be illegal, appealed on the grounds that the Probation Act, 18 U.S.C. § 3651,[233] did not authorize a sentence permitting a corporation, as an alternative to paying a fine, to make contributions to persons or groups not aggrieved by the crime.[234] In the alternative, the government requested a writ of mandamus be issued to the district court.[235] The defendants vigorously objected, contending that the government had no right of appeal absent explicit statutory authority, and that mandamus was not an appropriate remedy.[236] The Tenth Circuit held that the United States had the right to appeal an assertedly illegal sentence under both the provisions of 18 U.S.C. § 3731,[237] the Criminal Ap-

227. 695 F.2d 1236 (10th Cir. 1982).

228. Defendants were charged with violating section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). 695 F.2d at 1238.

229. Defendants were charged with violating 18 U.S.C. § 1341 (1982). 695 F.2d at 1238.

230. 695 F.2d at 1238.

231. *Id.*

232. *Id.* at 1238-39.

233. 18 U.S.C. § 3651 (1982). The statute provides in pertinent part:

> Upon entering a judgment of conviction . . . any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> . . . .
>
> While on probation and among the conditions thereof, the defendant— . . . May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . .

*Id.*

234. 695 F.2d at 1240.

235. *Id.*

236. *Id.*

237. 18 U.S.C. § 3731 (1982), which provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

peals Act, and under 28 U.S.C. § 1291,[238] which permits an appeal of a final decision.[239]

After analyzing decisions from the Supreme Court and various circuit courts, the Tenth Circuit concluded that, notwithstanding the limiting language of section 3731,[240] this statute removed all statutory barriers to criminal appeals.[241] As a result, only constitutional constraints, such as the double jeopardy clause,[242] could preclude government appeals in criminal cases.[243] Because the government's appeal was limited to the trial court's proposed modification of the original sentences, double jeopardy concerns did not bar this appeal.[244] Appellate jurisdiction was also sustained by holding that the trial court's sentences were final decisions within the meaning of section 1291.[245] Because of its assumption of jurisdiction and decision on the merits, the Tenth Circuit did not examine the propriety of mandamus in this case.[246]

In determining the legality of the terms of the sentence imposed by the district court, the Tenth Circuit, per Judge Barrett, adhered to the narrow interpretation of the Probation Act the Tenth Circuit first embraced in *United States v. Clovis Retail Liquor Dealers Trade Association*.[247] In *Clovis*, the defendants entered pleas of nolo contendere to charges of violating the Sherman Antitrust Act[248] through conspiring to fix retail liquor prices. As a condition of probation, the trial court had directed defendants to pay $233,500 to a private group which coordinated alcoholism treatment programs.[249] The Tenth Circuit reversed the trial court's sentence because it could not conclude that the recipient of the fund, or the persons it helped or represented, were aggrieved parties within the meaning of section 3651.[250]

Similarly, the Tenth Circuit in *Prescon* could not conclude that the alternative payment option imposed by the district court conformed to any of the special conditions of probation permitted by section 3651.[251] The court noted that the enumeration of the four specific conditions of probation did not "close the door" to other conditions, and reaffirmed its holding in *Porth v.*

238. 28 U.S.C. § 1291 (1982), which provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

239. 695 F.2d at 1240.

240. The plain language of section 3731 seems to limit its scope to court orders dismissing criminal charges. *See supra* note 237.

241. 695 F.2d at 1241.

242. U.S. CONST. amend. V, cl. 2.

243. 695 F.2d at 1241.

244. *Id.*

245. *Id.*

246. *See id.* at 1240.

247. 540 F.2d 1389 (10th Cir. 1976).

248. 15 U.S.C. §§ 1-7 (1982).

249. 540 F.2d at 1390.

250. *Id. See supra* note 233.

251. The Tenth Circuit reads section 3651 to permit, in addition to a fine, four special conditions of parole: "restitution or reparation to aggrieved parties, provision for support of a person for whom a defendant is legally responsible, participation in a residential community treatment center, and participation in a community program for drug addicts." 695 F.2d at 1242. *See* 18 U.S.C. § 3651 (1982).

*Templar*[252] that the conditions of parole must have "a reasonable relationship to the treatment of the accused and the protection of the public."[253] Nonetheless, the court held that the language of section 3651, which specifically permitted an order of restitution to aggrieved parties for actual injury or damages, precluded a trial court from ordering a defendant to make payments to parties who were not victims of the defendant's criminal conduct.[254] Clearly the nexus between the "aggrieved parties" and the alternative payments in *Prescon* was even less discernible than that in *Clovis*, where the dealers in alcoholic beverages were ordered to make payments to groups concerned with treating alcoholism. The Tenth Circuit therefore reversed the trial court's sentence and remanded the case for resentencing.[255]

### B. *"Creative Sentencing": A Survey*

Although the Tenth Circuit Court, absent any dissent, has adhered to a strictly limited and unequivocal interpretation of a court's power under section 3651, it should not be surmised that this approach represents the only reasonable reading of the statute. Several courts have explicitly rejected the reasoning used by the Tenth Circuit and have allowed a more liberal or "progressive" construction of section 3651, in promotion of the concepts of creative sentencing and behavioral sanctions.[256] These courts have not found the enumerated conditions of probation to be exclusive, nor have they been convinced that the maxim expressio unis exclusio alterius governs,[257] as is the Tenth Circuit.[258]

Perhaps most notable of the cases validating creative sentencing is the Eighth Circuit decision *United States v. William Anderson Co.*[259] *Anderson*, like *Prescon*, was a construction bid rigging and mail fraud case.[260] The corporate defendants in *Anderson* were placed on probation with special conditions,

252. 453 F.2d 330 (10th Cir. 1971).

253. *Id.* at 333. *Accord* United States v. Lawson, 670 F.2d 923 (10th Cir. 1982).

254. 695 F.2d at 1243.

255. *Id.* at 1245.

256. "Creative sentencing" and "behavioral sanctions" are terms used to describe a sentencing approach which seeks to provide an alternative to fines or incarceration where those sanctions appear inappropriate. This approach is often used with corporations whose monetary resources eliminate the punitive effect of a fine, *e.g.* United States v. Mitsubishi Int'l Corp., 677 F.2d 785 (9th Cir. 1982), and with defendants otherwise entitled to probation but for whom additional behavioral sanctions are needed. *E.g.*, United States v. Tonry, 605 F.2d 144 (5th Cir. 1979) (former state representative convicted for violating federal election laws required to refrain from political candidacy because of representative's demonstrated propensity to abuse electoral process). *See also* United States v. William Anderson Co., 686 F.2d 911 (8th Cir. 1982) (fine suspended upon payment to charity); United States v. Arthur, 602 F.2d 660 (4th Cir. 1979) (probation required employment with charity); United States v. Wright Contracting Co., 563 F. Supp. 213 (D. Md. 1983) (requiring payment to charity); United States v. Danilow Pastry Co., 563 F. Supp. 1159 (S.D.N.Y. 1983) (requiring donation of bread to charity; distinguishing *Prescon* as involving monetary payment).

257. *See* 695 F.2d at 1245.

258. The Tenth Circuit stated in *Prescon* that a more specific provision (grant of restitutionary power towards victim) governed over a more general provision (grant of power to order probation on terms court considers best). 695 F.2d at 1243.

259. 698 F.2d 911 (8th Cir. 1982).

260. *Id.* at 911.

including installment payment of fines to charitable organizations.[261] If the corporate defendant elected to pay the fine to the charitable organization for which its officers or employees were performing community service work in fulfillment of their individual sentences, then the amount payable to the Government was reduced pro tanto.[262] Judge Urbom of the United States District Court for the District of Nebraska, who imposed the sentences, opined that "a sentence should be constructive, if possible."[263]

The Eighth Circuit upheld *Anderson* on the principle that the purpose of section 3651 is to give judges broad discretion in fashioning sentences, and that unique probationary conditions are enumerated in section 3651[264] to place their propriety beyond doubt rather than to limit a court's discretion.[265] Several courts have reached similar conclusions, stating "[i]t would be hard to use more general words than 'upon such terms and conditions as the court deems best.' "[266] These courts have recognized that the broad discretion under section 3651 permits reversal only for abuse of that discretion,[267] and refuse to eliminate the discretion to impose sentences tailored to meet the circumstances of a particular case.[268]

Creative sentences, such as those imposed in *Anderson*, are intended to effect general rehabilitation and specific deterrence against the offense committed.[269] Such sentences alert corporate decisionmakers to the dangers of violating criminal law, thereby deterring corporate criminality.[270] Courts which impose and review these sentences view the restitution not as "actual restitution" but as "symbolic restitution," designed primarily to deter future misconduct on the part of defendants and reform the principles of their industry rather than provide compensation to victims.[271] Under such a view, "symbolic restitution" can be distinguished from the "restitution" language of section 3651, and escape even the strict construction of the Act adhered to by the Tenth Circuit. Accordingly, probationary conditions need not be limited by the requirements that any restitution be only to "aggrieved parties."

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261. *Id.* at 912.
262. *Id.*
263. *Id.*
264. *See supra* note 233.
265. 698 F.2d at 914. The Eighth Circuit explicitly noted that its decision was limited to the scope of a court's probationary (as opposed to sentencing) powers. *Id.*
266. *E.g.*, *Danilow Pastry Co.*, 563 F. Supp. at 1169 (quoting United States v. Pastore, 537 F.2d 675, 680 (2d Cir. 1976)).
267. *E.g.*, Fiore v. United States, 696 F.2d 207 (2d Cir. 1982). *See also* United States v. Pastore, 537 F.2d 675, 681 (2d Cir. 1976).
268. *See supra* note 256.
269. *See* Fisse, *Community Service as a Sanction Against Corporations*, 1981 WIS. L. REV. 970, 977.
270. *Anderson*, 698 F.2d at 913-14; *Danilow Pastry Co.*, 563 F. Supp. at 1167; *See* Note, *Structural Crime and Institutional Rehabilitation: A New Approach to Corporate Sentencing*, 89 Yale L.J. 353, 370-71 (1979).
271. *See, e.g.*, *Arthur*, 602 F.2d at 664; *Danilow Pastry Co.*, 563 F. Supp. at 1169.

# CRIMINAL PROCEDURE

## OVERVIEW

The Tenth Circuit's criminal procedure decisions over the past survey period were especially significant for both sides of the criminal bar. The court confronted the affect the availability of a telephone warrant can have in precluding a warrantless search, analyzed the affect the use of firearms has in characterizing a police detention, adopted the "inevitable discovery exception" to the exclusionary rule, and once again addressed the problems inherent in police use of a drug courier profile. The court also explored the sixth amendment implications of judicially foreshortened trial preparation time, and resolved several issues relating to exhaustion of claims prior to filing a federal habeas corpus petition. Additional issues addressed by the court are illuminated by the section headings.

## I. *UNITED STATES V. MASSEY*: POST-ARREST SILENCE AND THE DUE PROCESS CLAUSE

Massey and five others made a round trip from Oklahoma to Missouri to harvest wild marijuana.[1] Massey was arrested while returning to Oklahoma and was eventually convicted of possessing marijuana with intent to distribute and conspiracy to possess marijuana with intent to distribute.[2]

At trial, Massey testified that he had been a deputy sheriff and that he was acting in an undercover capacity when he made the trip to Missouri.[3] Massey told the jury that the undercover operation had been discussed in the presence of third parties prior to the trip.[4] This testimony was corroborated by two of those parties.[5] Massey was then cross-examined at length about his post-arrest failure to inform law enforcement authorities that he had been working in an undercover capacity.[6] During closing argument, the prosecutor encouraged the jury to conclude that Massey's exculpatory story was untrue because it had not been mentioned to the appropriate authorities following the arrest.[7]

Massey argued on appeal that reversible error occurred when the prosecutor was permitted to elicit evidence of Massey's post-arrest silence and comment upon that silence in an effort to impeach Massey's defense. The Tenth Circuit reversed Massey's conviction and remanded for further proceedings.[8] In an opinion by Judge Seymour, the court recognized that the

1. United States v. Massey, 687 F.2d 1348, 1351 (10th Cir. 1982).
2. *Id.* Massey's convictions were pursuant to 21 U.S.C. § 841(a)(1) (1982) (possession of marijuana with intent to distribute) and 21 U.S.C. § 846 (1982) (conspiracy to possess marijuana with intent to distribute).
3. 687 F.2d at 1351.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1356.

use of a defendant's post-arrest silence to impeach an exculpatory story violates due process if the silence follows the giving of *Miranda* warnings.[9] This is because the *Miranda* warnings contain an implicit assurance that the defendant will not be penalized for his silence.[10] Impeachment use of a defendant's silence before the giving of *Miranda* warnings, however, is permissible because in that context the defendant has not relied upon implicit police assurances that his silence will not be used against him.[11] The record in *United States v. Massey*[12] failed to indicate when, if at all, Massey was given his *Miranda* warnings.[13] The case was therefore remanded to the trial court for an evidentiary hearing on the timing of Massey's *Miranda* warnings.[14]

The Tenth Circuit's remand contained instructions for disposition of *Massey* following the evidentiary hearing. If the trial court found that Massey's post-arrest silence followed his receipt of *Miranda* warnings, the defendant would be entitled to a new trial because a review of the entire record convinced the Tenth Circuit that the constitutional error in *Massey* was not harmless beyond a reasonable doubt.[15] The court noted that Massey was questioned not only about his silence at the time of his arrest, but also about his silence at subsequent interrogations, at his initial appearance, at the magistrate's office, at the bond hearing, and at the arraignment.[16] Given the relentlessness of the prosecutor's attack on the "heart" of Massey's defense, the court ruled that if the trial court should find Massey's silence followed *Miranda* warnings, a new trial was mandated.[17]

## II. *UNITED STATES V. CUARON*: TELEPHONE WARRANTS AND EXIGENT CIRCUMSTANCES

*United States v. Cuaron*[18] required the Tenth Circuit to consider, for the first time, whether the circumstances surrounding an arrest were sufficiently

9. *Id.* at 1353. Miranda v. Arizona, 384 U.S. 436 (1966) requires that persons subjected to custodial interrogations be informed of their right to remain silent, the likelihood that incriminating statements will be used by the prosecution, and the right to counsel even if indigent. *Id.* at 467-68.

10. Doyle v. Ohio, 426 U.S. 610 (1976). *Doyle* is the dispositive Supreme Court decision on the use of post-arrest silence. In *Doyle*, the Court held that because the *Miranda* warnings implied that a defendant would not be penalized for remaining silent, due process was violated by commenting on silence which had been encouraged by giving the warnings. *Id.* at 618-19 (citing United States v. Hale, 422 U.S. 171, 182-83 (1975)).

11. Fletcher v. Weir, 455 U.S. 603 (1982), *cited in* United States v. Massey, 687 F.2d 1348, 1353 (10th Cir. 1982).

12. 687 F.2d 1348 (10th Cir. 1982).

13. *Id.* at 1353.

14. *Id.*

15. *Id.* at 1354. The court stated that the following factors were significant in determining the degree of constitutional error caused by prosecutorial use of post-arrest, post-*Miranda* warning silence: 1) the nature of the prosecution's use of the silence; 2) whether the prosecution or defendant initiated the inquiry into the silence; 3) the quantum of other inculpatory evidence; 4) the degree of prosecutorial emphasis on the silence; and 5) the trial judge's opportunity to grant a mistrial or issue a curative instruction. *Id. See also* Williams v. Zadradnick, 632 F.2d 353 (4th Cir. 1980), *quoted in Massey*, 687 F.2d at 1353.

16. 687 F.2d at 1354.

17. *Id.*

18. 700 F.2d 582 (10th Cir. 1983).

exigent to justify police failure to obtain even a telephone warrant.[19] The Tenth Circuit, over a dissent by Judge Kelly,[20] upheld the trial court's ruling that the exigent circumstances in *Cuaron* justified a warrantless entry into a private home.[21]

*Cuaron* arose after Jon and William Neet sold four ounces of cocaine to undercover Drug Enforcement Agency (DEA) agents in Boulder, Colorado.[22] The agents negotiated for the purchase of two additional pounds of the drug, which the Neets agreed to procure from their supplier.[23] Jon was followed to the home of Frank Cuaron, which was immediately placed under surveillance.[24] When John returned to the hotel and delivered additional cocaine to the undercover agents, he and his brother were promptly arrested, and the agents began efforts to obtain a state court warrant to search Cuaron's home.[25] Less than an hour after the Neets were arrested, the agents decided to "secure" Cuaron's home without a warrant.[26] Entering the home, the agents saw one occupant apparently signal another person in an upstairs room; an agent rushed up the stairs and caught Cuaron in the act of flushing cocaine down the toilet.[27] Cocaine lying in plain view was also seized.[28]

Cuaron was later convicted on four related counts[29] and appealed on

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19. *Id.* at 586. Telephone warrants were authorized by Congress to encourage police officers to obtain warrants when circumstances existed which might induce an officer to conduct a warrantless search. *Id.* at 588-89 (citing United States v. McEachin, 670 F.2d 1139, 1146 (D.C. Cir. 1976); S. REP. NO. 354, 95th Cong., 1st Sess. 10, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 527, 534. The provision for telephone warrants is found in FED. R. CRIM. P. 41(c)(2), which provides in pertinent part:

> *Warrant upon Oral Testimony*
>
> (A) General Rule. If the circumstances make it reasonable to dispense with a written affidavit, a Federal magistrate may issue a warrant based upon sworn oral testimony communicated by telephone or other appropriate means.
>
> (B) Application. The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read such duplicate original warrant, verbatim, to the Federal magistrate. The Federal magistrate shall enter, verbatim, what is so read to such magistrate on a document to be known as the original warrant. The Federal magistrate may direct that the warrant be modified.
>
> (C) Issuance. If the Federal magistrate is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit and that grounds for the application exist so that there is probable cause to believe that they exist, the Federal magistrate shall order the issuance of a warrant by directing the person requesting the warrant to sign the Federal magistrate's name on the duplicate original warrant. The Federal magistrate shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

20. Honorable Patrick F. Kelly, District Judge, United States District Court for the District of Kansas, sitting by designation.

21. United States v. Cuaron, 700 F.2d 582, 591 (10th Cir. 1983).

22. *Id.* at 585.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. Cuaron was convicted of two counts of distributing cocaine in violation of 21 U.S.C. § 841(a)(1) (1982) and 21 U.S.C. § 2 (1982); one count of conspiring to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982); and of possessing cocaine with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (1982). 700 F.2d at 584.

the ground, inter alia, that the trial court had wrongfully failed to suppress evidence discovered through the warrantless search of his home.[30] Cuaron did not argue that exigent circumstances could never justify a warrantless search; rather, he argued that the DEA agents had no objective basis to believe that criminal evidence was about to to be destroyed, thereby precluding a finding of exigent circumstances in his case.[31] Cuaron further argued that in any event there was sufficient time to obtain a federal search warrant by telephone pursuant to Federal Rule of Criminal Procedure 41(c),[32] and that the agents' violation of the fourth amendment's[33] prohibition against warrantless searches therefore could not have been justified by exigent circumstances.[34]

The Tenth Circuit opinion, by Judge Seymour, noted that warrantless seizures inside a home are presumptively unreasonable,[35] and that the prosecution has the burden of establishing exigent circumstances.[36] The court found that the agents' initial entry into Cuaron's home was prompted by their reasonable belief that criminal evidence and contraband *might* be destroyed or removed before a warrant could have arrived.[37] The agents knew that the Neets were to return to effect yet another purchase, but that the Neets had been arrested and would not be returning to the home within the time expected.[38] The agents also knew that cocaine is easily transported or destroyed,[39] and that several people had arrived and left Cuaron's residence following Jon Neet's arrest.[40] Further, the agents had information that Cuaron was interested in selling his supply of cocaine as quickly as possible.[41] Finally, the agents were "aware" that the supplier was nervous about operating from his home.[42] In the court's view, under these circumstances the agents could reasonably believe there was insufficient time to obtain either a conventional warrant or a telephone warrant without losing impor-

30. 700 F.2d at 586.

31. *Id.* The Supreme Court has never expressly sanctioned an independent "destruction of evidence" exception to the fourth amendment's warrant requirement, although dicta has suggested approval for warrantless entries in such circumstances. *See, e.g.*, United States v. Santana, 427 U.S. 38 (1976). In *Santana*, a warrantless entry into the defendant's home was upheld on the basis that the police were in "hot pursuit" of the defendant. *Id.* at 43. One of the reasons supporting this holding was a "realistic expectation" that police delay would result in the destruction of evidence. *Id.*

The dissenting judge in *Cuaron* pointedly contrasts a "realistic expectation" test for recognizing an exigency with the majority's test for assessing the existence of a purported exigency—whether the officers have reason to believe that evidence may be lost or destroyed. *See* 700 F.2d at 592-93 (Kelly, J., dissenting). The dissent concludes that the latter test is so slippery and unreliable that its application threatens to swallow the warrant requirement altogether. *Id.*

32. 700 F.2d at 589. *See supra* note 19.

33. U. S. CONST. amend IV.

34. 700 F.2d at 586.

35. *Id.* at 586 (citing Payton v. New York, 445 U.S. 573 (1980)).

36. 700 F.2d at 580 (citing United States v. Baca, 417 F.2d 103 (10th Cir. 1969), *cert. denied*, 404 U.S. 979 (1971)).

37. 700 F.2d at 586-87.

38. *Id.* at 586.

39. *See id.* at 587.

40. *Id.* at 586-87.

41. *Id.* at 586.

42. *Id.* at 587.

tant evidence.[43] Thus, the warrantless search was constitutionally permissible, and the trial court properly admitted the evidence.[44]

Judge Seymour rejected the argument that the finding of an exigency should have been affected by the fact that the agents delayed their warrantless search for fifty-five minutes after Neet's arrest.[45] As long as probable cause and exigent circumstances existed under the specific facts of *Cuaron*, delaying a search did not remove the exigent circumstance, even if the period of delay would have allowed the officers to obtain a warrant.[46]

After rejecting Cuaron's arguments, the court articulated a prophylactic standard to be used in all future cases involving exigent circumstances. In *Cuaron*, the trial court had failed to consider the availability of a telephone warrant.[47] While the Tenth Circuit found that failure harmless in *Cuaron*,[48] the court did state that trial courts must henceforth consider the availability of a telephone warrant in determining whether exigent circumstances existed, unless the "critical nature of the circumstances clearly prevented the effective use of *any* warrant procedure."[49] Absent such a clear and compelling exigency, the prosecution must bear the burden of submitting evidence regarding the availability of a telephone warrant and the time necessary to obtain one before a warrantless "exigent search" will be upheld.[50]

Judge Kelly filed a sharp dissent. In his view, the majority's opinion will invite "excusable neglect" of established search and seizure procedures, license future abuse, and unnecessarily plague the courts.[51] Judge Kelly was bothered by the majority's reliance on one agent's speculative (and self-serving) testimony regarding the likelihood that evidence would be destroyed or removed.[52] In his opinion, the court should make an objective comparison between the likelihood that evidence will be lost or destroyed and the likelihood that a warrant cannot be timely obtained.[53] Judge Kelly preferred justifing a warrantless "destruction of evidence" exigency only when the constable has something near a "realistic expectation" that evidence will be lost if time is taken to obtain a warrant.[54] Additionally, Judge Kelly felt that the majority failed to accurately assess the time required to obtain a telephone warrant, because its calculation was based on reference to the time normally required to obtain a warrant from a state judge, rather than by reference to

43. *See id.* at 587-90. The trial court did not assess the possibility of obtaining a timely telephone warrant, and apparently the prosecution did not offer any evidence on the question. Despite this evidentiary vacuum, Judge Seymour managed to conclude that such a warrant could not possibly be obtained within 30 minutes. *Id.* at 590.

44. *Id.* at 591.

45. *Id.* at 590.

46. *Id.*

47. *Id.* at 588.

48. *See supra* note 43 and accompanying text.

49. 700 F.2d at 589 (emphasis in original).

50. *Id.* at 589-90. The court emphasized that *Cuaron* was a unique situation, and that law enforcement agencies should not treat the decision as creating a significant breach in the fourth amendment warrant requirement. *See id.* at 590 & n.6.

51. *Id.* at 591 (Kelly, J., dissenting).

52. *Id.* at 592.

53. *Id.* at 593.

54. *Id. See also supra* note 31.

the particular time efficiencies created by the availability of a telephone warrant.[55] Finally, Judge Kelly opined that because the prosecution offered no evidence on how long it would have taken to secure a telephone warrant, the search must fall to the presumption that warrantless searches are unreasonable.[56] The telephone warrant was not "an option tendered solely for the investigating officers' convenience."[57] Rather, even in circumstances like those of *Cuaron* a timely attempt to obtain a telephone warrant should have been mandatory, and conduct to the contrary by well-trained but overzealous federal agents should not have been excused.[58]

## III. RESTRICTING THE LIMITS OF A *TERRY* PATDOWN SEARCH

In *United States v. Ward*[59] the defendant challenged the admission of evidence obtained from a non-arrest patdown search made during a lawful search of the defendant's home.[60] Internal Revenue Service agents had obtained a warrant to search Ward's residence for evidence of illicit bookmaking activities.[61] Although the agents' affidavits supporting issuance of the search warrant established probable cause to search Ward's person,[62] the warrant authorized only a search of the residence.[63] The agent executing the search conducted a cursory patdown search of Ward's person before searching the house, and then asked Ward if he carried weapons.[64] Ward was ordered to empty his pockets after revealing he carried a pocketknife;[65] this action precipitated discovery of betting slips and checks which were admitted into evidence at trial over Ward's objection.[66] Ward argued that this evidence should have been suppressed because the scope of the warrant did not authorize a search of his person.[67] The government argued that the patdown search constituted a reasonable frisk for weapons under the doc-

55. *See* 700 F.2d at 594 (Kelly, J., dissenting). Judge Kelly observed that the magistrate could have been put "on hold," obviating many time constraint exigencies. *Id.*

56. *Id.* The Supreme Court has stated that "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." Payton v. New York, 445 U.S. 573, 586 (1980).

57. 700 F.2d at 594 (Kelly, J., dissenting).

58. *Id.* at 594-95. Neither the dissenting judge nor the majority discuss the agents' role in *creating* the exigency. It is not clear from either opinion why the agents chose to arrest the Neets when they did. Presumably, Jon Neet could have been allowed to return to Cuaron's while the warrant was being obtained. There is no indication in the opinions that any cocaine or cash would have been lost had the agents simply continued their surveillance without arresting the Neets while they waited the "two or three hours" necessary to obtain a state warrant, or the shorter time required to obtain a federal telephone warrant. In United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974), the court held that under circumstances similar to those in *Cuaron*, an exigency which followed the agents' conduct could *not* be utilized as an "easy by-pass of the constitutional requirement that probable cause should generally be assessed by a neutral and detached magistrate before the citizen's privacy is invaded." *Id.* at 630.

59. 682 F.2d 876 (10th Cir. 1982).

60. *Id.* at 879.

61. *Id.* at 877.

62. *Id.* at 878 n.2.

63. *Id.*

64. *Id.* at 878.

65. *Id.*

66. *Id.*

67. *Id.* at 879.

trine of *Terry v. Ohio*[68] and was therefore constitutionally sound regardless of the scope of the search warrant.[69] The trial court admitted the evidence, and Ward was convicted of failure to purchase a wagering stamp.[70]

The Tenth Circuit, with Judge McWilliams dissenting, reversed. In an opinion by Judge Barrett, the court held that a patdown search is permissible under *Terry* only if it is supported by a reasonable belief that the subject of the search is armed and presently dangerous.[71] Because nothing in the record indicated that the agents believed Ward was armed and presently dangerous,[72] the evidence discovered during the patdown was illegally seized and its admission into evidence gave rise to reversible error.[73] The court noted that this fourth amendment violation could have been easily avoided had the search warrant been drafted to include a search of Ward's person.[74]

In dissent, Judge McWilliams emphasized that Ward was the target of a criminal investigation, and obviously realized this fact when the agents arrived at his home for the purpose of executing the search warrant.[75] Judge McWilliams suggested that when a search of a residence must be conducted in the presence of a home owner who is aware that he is a "target" in a criminal investigation, the searching officer may reasonably infer that the homeowner is armed and dangerous and may therefore conduct a limited patdown search for weapons for their protection.[76] Thus, the search of Ward was permissible under *Terry*.[77]

Apparently the government did not argue, nor did the court consider, that the search of Ward's person was valid as an adjunct to the evidence-gathering function of the search warrant. For instance, in *Ybarra v. Illinois*[78] the defendant, a tavern patron, was illegally searched during the execution of a search warrant which made no mention of criminal involvement by any of the patrons.[79] The Court emphasized that none of the circumstances in that case indicated to the police that Ybarra was connected with the criminal activity to which the search warrant was addressed, and therefore no probable cause to search Ybarra existed.[80] The circumstances in *Ward* are quite different from those in *Ybarra*. As noted in the dissenting opinion, Ward was the "target" of the investigation,[81] and, as noted in the majority opinion, the agent's affidavit was adequate to establish probable cause for

68. 392 U.S. 1 (1968). *Terry* held that a police officer questioning a citizen as part of a police investigation may, when he reasonably suspects that person to be "armed and presently dangerous," frisk that person in an attempt to discover potential weapons of assault. *Id.* at 30.

69. *See* 682 F.2d at 879.

70. *Id.* Ward's failure to purchase a wagering stamp violated 18 U.S.C. § 7203 (1982).

71. 682 F.2d at 880. *Accord* Ybarra v. Illinois, 444 U.S. 85, 92-93 (1979).

72. 682 F.2d at 881.

73. *Id.*

74. *Id.*

75. *Id.* at 882 (McWilliams, J., dissenting).

76. *Id.* at 882-83.

77. *Id.* at 882.

78. 444 U.S. 85 (1979).

79. *Id.* at 90.

80. *Id.* at 90-91. The Court also held that, given Ybarra's behavior, the police could not subject him to a *Terry* search. *Id.* at 93-94.

81. *See supra* note 75 and accompanying text.

searching both the residence and Ward's person.[82] Further, many of the items mentioned in the search warrant could easily have been (and indeed were) concealed on Ward's person. Under these circumstances, state court cases since *Ybarra* almost invariably permit frisks of persons strongly identified with the premises searched.[83] Also, it might be argued that *Ward* is closer to *Michigan v. Summers*[84] than to *Ybarra*. *Summers* held that occupants of a private premises may be seized and detained while a search warrant for contraband is executed because of the potential danger attendant to executing the search warrant when persons connected with those premises are present.[85] *Summers'* holding was based on a recognition that, after a premises-specific search warrant issues, detaining the occupants present during the search constitutes a minimal intrusion on personal liberty while simultaneously providing significant personal protection to the searching officers.[86] In view of *Summers'* holding and rationale, it would not be implausible to suggest that the incremental liberty intrusion stemming from a frisk during a *Summers* detention is similarly outweighed by the increased protection that frisk provides for those executing the search. Thus, a slight extension of *Summers* could have validated the search made in *Ward*, even though the search would not have been justified by *Terry*.

## IV. *UNITED STATES V. MERRITT*: SHOW OF FORCE AND THE *TERRY* STOP

### A. *The Case*

Denver police officers had received word that Thomas Gerry, a Texas fugitive wanted for murder, was staying at a home on Sherman Street in Denver.[87] Several officers went to this location; Gerry was not there, but the officers learned that he would be returning later that evening.[88] Gerry was believed to be heavily armed and dangerous, and the officers observed an impressive array of weapons and ammunition at the Sherman Street address.[89]

The officers then set up a stakeout, in anticipation of Gerry's return.[90] Several hours later, while a police cruiser was parked in front of the Sherman Street home, some officers observed a white pickup truck circle the block, stop, and switch off its lights.[91] Nobody exited the truck, and it appeared that the truck's occupants had assumed a crouching position.[92] Three of-

82. *See supra* note 62 and accompanying text.

83. *E.g.*, People v. Broach, 111 Mich. App. 122, 314 N.W.2d 544 (1982); State v. Brooks, 51 N.C. App. 90, 275 S.E.2d 202 (1981); Lippert v. State, 653 S.W.2d 460 (Tex. Crim. App. 1982).

84. 452 U.S. 692 (1981).

85. *Id.* at 705.

86. *Id.* at 702-04.

87. United States v. Merritt, 695 F.2d 1263, 1265 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 1898 (1983).

88. *Id.* at 1266.

89. *Id.* at 1265-66. The police observed shotguns, handguns, and what appeared to be an automatic rifle. *Id.* at 1266.

90. *Id.* at 1266.

91. *Id.*

92. *Id.*

ficers then approached the truck with weapons, including shotguns, pointed at the truck;[93] the occupants were ordered out and told to "freeze."[94] One or two shotguns were pointed at the suspects at this time, and one shotgun remained aimed at the suspects throughout the incident.[95] After identification revealed that Thomas Gerry was one of the truck's occupants, the truck was checked for weapons, and a loaded revolver was recovered from underneath the driver's seat.[96] Merritt, who was also one of the truck's occupants, was then formally arrested.[97]

The trial court suppressed the revolver and several inculpatory statements made by Merritt subsequent to his arrest on the ground that the police did not, at the time they ordered Merritt and the others from the truck, have the reasonable suspicion *Terry v. Ohio*[98] requires in order to justify a police investigatory stop.[99] In an alternative holding, the trial court ruled that in Merritt's case the police had actually made an arrest without probable cause, even though there may have been justification to make a "stop."[100]

The government took an interlocutory appeal from the trial court's suppression order.[101] In a well-reasoned opinion by Judge Anderson, the Tenth Circuit reversed the suppression order. The court held that, based upon the totality of the circumstances, the officers who effected the stop had a particularized and objective basis for suspecting that the occupants of the truck were or had been involved in a criminal activity, and could therefore make a stop to determine the identities of those in the truck.[102]

### B. *Use of Hearsay in Suppression Hearings*

Judge Anderson observed that the trial court erred at the suppression hearing when it excluded testimony by two officers concerning critical information a third officer had conveyed to them describing the appearance and movements of the truck and its occupants near the Sherman Street address.[103] The Tenth Circuit found that this evidence, if admitted, would have provided the necessary link to justify a *Terry* stop.[104]

Before reversing the district court's determination that no reasonable suspicion existed, the Tenth Circuit pointed out that a trial court generally is

93. *Id.* at 1267.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. 392 U.S. 1 (1968). The "reasonable suspicion" required for a *Terry* stop is "[a] particularized and objective basis for suspecting the particular person stopped of criminal activity." United States v. Cortez, 449 U.S. 411, 417-18 (1981). The reasonableness of a suspicion is determined by viewing the "totality of circumstances" confronting the officer. *Id.*
99. 695 F.2d at 1267.
100. *Id.* It is axiomatic that probable cause is required to make a valid arrest. Probable cause must be based on the likelihood of an individual's guilt, rather than on reasonable suspicion of possible criminal activity. *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE § 3.1 (1978).
101. 695 F.2d at 1267. *See* 18 U.S.C. § 3731 (1982).
102. 695 F.2d at 1269. *See supra* note 98 and accompanying text.
103. 695 F.2d at 1269. The third officer did not testify at the suppression hearing. *Id.*
104. *Id.*

not bound by the rules of evidence during a suppression hearing,[105] and that consideration should have been given to the officers' vital testimony, despite its hearsay character, because these statements were corroborated by other testimony.[106] Moreover, given Gerry's known dangerous character, the officers who made the hearsay statements had every reason to report their observations of suspicious behavior as accurately as possible.[107] Because police officers may rely on hearsay statements "as the basis for reasonable suspicion to make a stop, they should also be permitted to offer that same hearsay as testimony to support their reasonable suspicion when a defendant moves to suppress evidence on the ground that reasonable suspicion did not exist."[108] In reaching its conclusion the Tenth Circuit relied on *United States v. Matlock*,[109] which approved the use of hearsay evidence in a suppression hearing concerning third party consent to a premises search.[110]

Furthermore, reasonable suspicion could rest upon the collective knowledge of the police officers rather than solely upon the knowledge of the officer actually making the stop.[111] In light of the collective knowledge of the officers involved in the stakeout and stop, the requisite reasonable suspicion was manifest, and the initial stop was entirely proper.

### C. *Show of Force During* Terry *Stop*

The Tenth Circuit also rejected the trial court's conclusion that Merritt was in fact arrested, not merely stopped.[112] The trial court reasoned that the encounter immediately escalated into an arrest because the level of force employed by the police officers during the encounter went beyond that apparently authorized by *Terry*.[113] The Tenth Circuit observed that the trial court's analysis somehow assumed that some level of police force during an otherwise valid *Terry* stop turns the stop into an arrest requiring probable cause, regardless of the justification that may exist for the degree of force used.[114] The Tenth Circuit reasoned that this view of the distinction between a stop and arrest diverted a court's focus from the central concern in all fourth amendment cases, which is the reasonableness of the police intrusion in light of all the surrounding circumstances.[115] The relevant inquiry was not whether the force used was of a quantum requiring characterization of a stop as an arrest, but rather whether the police used reasonable force.[116] In this case the officers' show of force, including the continuous pointing of

105. *See* FED. R. EVID. 104(a), 1101(d)(1).
106. 695 F.2d at 1270.
107. *Id.*
108. *Id.*
109. 415 U.S. 164 (1974).
110. *Id.* at 175. The Court indicated that hearsay evidence should be admitted at suppression hearings when the circumstances surrounding the evidence, including corroborating statements by other witnesses, indicate that the hearsay statement is reliable. *Id.* at 175-76.
111. 695 F.2d at 1268 n.9. The "fellow-officer" rule adopted in *Merritt* had previously been recognized in cases concerning the existence of probable cause for an arrest. *Id.*
112. 695 F.2d at 1272.
113. *Id.*
114. *Id.*
115. *Id.* at 1274.
116. *Id.*

weapons, was reasonable given their reasonable suspicion that an armed, dangerous murderer was present.[117] Thus, "the incremental intrusion visited upon a citizen's personal security by having a gun pointed at him instead of merely drawn, as was true here, is outweighed by the increased protection the officers afford themselves by making certain of their safety in face of the danger presented."[118]

This approach to the investigatory stop arrest distinction is apparently inconsistent with the approach recently taken by a Supreme Court plurality in *Florida v. Royer*.[119] In that case, the defendant fit a drug courier profile and was subjected to a valid *Terry* stop.[120] Following an initial public stop, however, the defendant was taken to a small room, where he was alone with two police officers who accused him of carrying narcotics.[121] The court held that because of the intensity of the detention and its purpose (to search the defendant's luggage) at some point the stop matured or escalated into a functional, though not a formal, arrest unsupported by probable cause.[122] To the extent the Tenth Circuit's reasoning diminishes the significance of an intensive, facially coercive detention, it appears inconsistent with *Royer*.

*Merritt* is also inconsistent with those circuits which hold that the use of a drawn, or at the very least pointed, gun converts a stop into an arrest.[123] The court, however, felt that if such clearly self-protective actions as those taken in arresting Merritt turned every such confrontation into an arrest, an important public interest in police safety would be sacrificed.[124] Weighed against the incremental intrusion on a person's liberty stemming from reasonable police use of weapons, the public interest in police safety required recognizing that the use of drawn and pointed weapons does not in and of itself transform a *Terry* stop into an arrest.[125]

## V. ADOPTION OF THE INEVITABLE DISCOVERY EXCEPTION TO THE EXCLUSIONARY RULE

In *United States v. Romero*[126] the Tenth Circuit both recognized that the scope of a weapons search incident to a *Terry* stop extends to the detainee's vehicle[127] and adopted the "inevitable discovery" exception to the exclusionary rule.[128] *Romero* began when a tip made to a Drug Enforcement Agency agent, supported by corroborative first-hand observations, led Albuquerque police officers to reasonably suspect that Romero and Ortega were in posses-

117. *See id.*
118. *Id.*
119. 103 S. Ct. 1319 (1983).
120. *See id.* at 1326.
121. *Id.* at 1327.
122. *Id.* at 1328-29.
123. *See* United States v. White, 648 F.2d 29 (D.C. Cir. 1981); United States v. Strickler, 490 F.2d 378 (9th Cir. 1974).
124. 695 F.2d at 1274.
125. *Id.*
126. 692 F.2d 699 (10th Cir. 1982).
127. *Id.* at 703.
128. *Id.* at 704.

sion of a substantial amount of marijuana.[129] The van in which these two were riding was stopped and they were ordered out of the vehicle.[130] Officer Espinosa conducted a patdown search of Romero.[131] While Espinosa was patting down Romero, Officer Ortiz was inspecting the driver's seat area of the van for weapons and detected a strong odor of marijuana.[132] As he walked around the van to check for weapons on the passenger side, Ortiz stated that "It smells like a ton of dope in there."[133]

Either immediately before or after Officer Ortiz's announcement concerning the marijuana smell[134] Officer Espinosa felt a "stiff bulge" in Romero's pocket.[135] Although not believing the bulge to be a weapon,[136] the officer reached into the pocket and pulled out a small amount of marijuana.[137] Romero and Ortega were arrested; a subsequent search of the van pursuant to a search warrant resulted in the discovery of several pounds of marijuana, and Romero was eventually convicted of possession of marijuana with intent to distribute.[138]

The defendants appealed on the grounds, inter alia, that the officers twice exceeded their authority under *Terry*, first by searching the van's interior for weapons, and second by seizing the marijuana from Romero's pocket despite Officer Espinosa's belief that the "stiff bulge" was not a weapon.[139]

### A. *Search of Vehicle Permissible Under* Terry

In an opinion by Judge Logan, the Tenth Circuit affirmed the conviction.[140] The court first held that just as an officer may search a car for weapons during a lawful arrest,[141] an officer who has lawfully stopped a suspect whom he reasonably suspects is armed and dangerous may conduct a limited weapons search of the suspect's car.[142] The court reasoned that such a suspect may have concealed a weapon in a part of a car readily accessible to him, and might "break away from the police and grab the weapon or, if allowed to return to the car, . . . may shoot or harm an officer."[143] In light of the potential danger in a traffic stop involving a suspect reasonably be-

129. *Id.* at 701.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. The trial court's findings did not set forth the exact sequence of events. *Id.* at 704.
135. *Id.* at 701.
136. *Id.*
137. *Id.*
138. *Id.* at 701-02. Romero was found guilty of violating 21 U.S.C. § 841(a)(1) (1982).
139. 692 F.2d at 702.
140. *Id.* at 705.
141. New York v. Belton, 453 U.S. 454 (1981).
142. 692 F.2d at 703.
143. *Id.* The expansion of *Terry* recognized in *Romero* was recently validated by Michigan v. Long, 103 S. Ct. 3469 (1983). *Long* held that *Terry* did not limit protective searches to the suspect's person, and that a weapons search of the passenger compartment of a suspect's vehicle is permissible under *Terry* when an officer has a reasonable belief in articulable facts suggesting that the suspect may be dangerous and may have immediate access to weapons in the passenger compartment. *Id.* at 3480.

lieved to be armed,[144] the fact that Romero and Ortega were out of the van and under the control of other officers before the van was searched did not render the search an unreasonable intrusion upon a citizen's liberty.

### B. *Adoption of the "Inevitable Discovery" Exception*

The seizure of marijuana from Romero's pants pocket was more troublesome for the court. The court reasoned that if Officer Ortiz's announcement concerning the marijuana odor preceded the seizure of marijuana, the seizure might be justified as a search incident to a lawful arrest because the marijuana odor, combined with the anonymous tip and the corroborating observations which initially justified the stop, gave the officers probable cause to arrest.[145] Any search thereafter would be proper as a search incident to a lawful arrest. If Officer Ortiz's announcement followed the seizure, however, the evidence was illegally seized because Officer Espinosa believed that the bulge in Romero's pocket was not a weapon, precluding seizure under *Terry*.[146]

Rather than remanding the case to the trial court for a finding as to the timing of Officer Ortiz's announcement, the Tenth Circuit adopted the "inevitable discovery" exception to the exclusionary rule.[147] Under this exception, illegally seized evidence is admissible if there is "no doubt" that the police would have lawfully discovered the evidence at a later time.[148] Applying this exception to the facts of *Romero*, the court observed that the van search was underway as Romero was being patted down, and that Officer Ortiz's announcement could have occurred no more than a few seconds after the seizure of marijuana from Romero's pocket.[149] The discovery of the marijuana odor in the van provided probable cause to arrest, and upon arrest the officers would unquestionably have searched Romero and inevitably would have discovered the marijuana in the pants pocket.[150]

### C. *Exceptions to the Exclusionary Rule*

The Supreme Court has recognized several discrete situations where the victim of illegal police conduct cannot use the exclusionary rule to suppress evidence. One such situation is where the police are able to obtain illegally seized evidence from an "independent source"; that is, a source whose knowledge and possession of the evidence were not the result of the illegal police conduct.[151] Another exception is where the connection between the illegal police conduct and evidence subsequently acquired is so "attenuated"

144. *See* Michigan v. Long, 103 S. Ct. 3469, 3479 & n.13 (1983).
145. 692 F.2d at 703.
146. *Id.*
147. *Id.* at 704.
148. *Id.* The Tenth Circuit noted that although the Supreme Court has not formally adopted this exception to the exclusionary rule, *id.* (citing Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977)), most circuit courts recognize the inevitable discovery rule. 692 F.2d at 704.
149. 692 F.2d at 704.
150. *Id.*
151. This rule was announced in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). The Court reaffirmed *Silverthorne* in Nardone v. United States, 308 U.S. 338, 341 (1939) and in Costello v. United States, 365 U.S. 265 (1961).

as to warrant the conclusion that the evidence was not obtained by exploiting the illegal conduct.[152]

The Fifth Circuit has announced a "good faith" exception to the exclusionary rule. In *United State v. Williams*,[153] the court refused to suppress evidence "[d]iscovered by officers in the course of actions that are taken in good faith and in the reasonable though mistaken belief that they are authorized."[154] The Fifth Circuit reasoned that the "good faith" exception is consistent with the purpose of the exclusionary rule, which exists to deter willful or flagrant actions by law enforcement officers, not to deter reasonable, good faith actions.[155] Although the Supreme Court has not, to date, adopted such a broad good faith exception, it appears to be on the verge of doing so in its next term.[156]

Still another exception to the exclusionary rule, the inevitable discovery doctrine, has been explicitly recognized by lower federal and state courts, but has never been expressly sanctioned by the Supreme Court.[157] This exception permits the prosecution to use unlawfully obtained evidence if it can demonstrate that the evidence would inevitably have been discovered by lawful means. The prosecution must initially demonstrate that the police did not use illegal conduct as a means of discovering the evidence.[158] The prosecution must then prove that the evidence would have been found without use of illegal conduct and must prove how it would have been found.[159] All the courts adopting this exception agree that the prosecution has the burden of proving these elements, but have split as to whether the burden is a preponderance standard or a clear and convincing standard.[160]

Although the Tenth Circuit did not expressly adopt the inevitable dis-

152. Nardone v. United States, 308 U.S. 338 (1939) is the source of this rule. More recent cases applying this principle are United States v. Ceccolini, 435 U.S. 268 (1978) and Brown v. Illinois, 422 U.S. 590 (1975).

153. 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). *See generally* Note, United States v. Williams: *The Good Faith Exception to the Exclusionary Rule*, 32 MERCER L. REV. 1329 (1981).

154. 622 F.2d at 840. Several states have enacted legislation codifying the good faith exceptions. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3925 (Supp. 1983-84); COLO. REV. STAT. § 16-3-308 (Supp. 1983).

155. *See* 622 F.2d at 842.

156. Justice White's concurring opinion in *Illinois v. Gates*, 103 S. Ct. 2317 (1983) approves of a good faith exception to the exclusionary rule. *Id.* at 2344 (White, J., concurring). The Court declined to consider the good faith exception on jurisdictional grounds, *id.* at 2321-25, but has granted certiorari to review two cases which raise the good faith exception issue. *See* United States v. Leon, 701 F.2d 187 (9th Cir. 1983), *cert. granted*, 103 S. Ct. 3535 (1983); Commonwealth v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), *cert. granted sub nom.* Massachusetts v. Sheppard, 103 S. Ct. 3534 (1983).

157. *See* Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977). The first clear application of this doctrine was in Somer v. United States, 138 F.2d 790 (2d Cir. 1943).

158. *See* State v. Williams, 285 N.W.2d 248, 261 (Iowa 1979), *cert. denied*, 446 U.S. 921 (1980) (prosecution must show that bad faith actions were not taken in order to hasten discovery of the evidence). *See also* United States v. Brookins, 614 F.2d 1037, 1048 (5th Cir. 1980) (prosecution must show that, at time of illegality, police were pursuing the evidence or leads which would have reasonably led to evidence).

159. *See* State v. Williams, 285 N.W.2d 248, 260 (Iowa 1979).

160. *Compare* United States v. Schipani, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970) (preponderance) *with* Government of Virgin Islands v. Gereau, 502 F.2d 914, 927 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) (clear and convincing).

covery exception until *Romero*, it applied its rationale in *United States v. Leonard*,[161] a case decided two years earlier. In *Leonard*, police officers located a gun in the glove compartment of Leonard's car during an inventory search executed after his arrest.[162] Prior to that discovery, however, the arresting officer had discovered the gun's location through an illegal interrogation of Leonard.[163] The Tenth Circuit upheld the trial court's refusal to suppress the gun, because it was actually recovered during a valid inventory search and because its discovery was inevitable regardless of Leonard's statement.[164] The Tenth Circuit, however, based its decision on the independent source exception to the exclusionary rule[165] rather than the inevitable discovery exception.[166]

### D. *Problems with* Romero

The court's decision in *Romero*, while it unambiguously adopts the inevitable discovery exception, offers little or no explanation as to when and how the exception should be applied by trial courts. The court did not intimate what the burden of proof should be, nor was any attention paid to the good faith vel non of the officer who improperly recovers the challenged evidence. Future cases are necessary to show how the Tenth Circuit will shape the criteria for use of the exception in district courts, and to demonstrate to what extent this exception will affect defendants seeking suppression of evidence.

## VI. *McCRANIE V. UNITED STATES*: REASONABLE SUSPICION AND THE DRUG COURIER PROFILE

In *McCranie v. United States*[167] the Tenth Circuit, in affirming a conviction for possession of cocaine with intent to distribute, held that the correlation of a person's behavior with a "drug courier profile," in conjunction with evidence obtained through investigation based on that correlation, was sufficient to justify seizing that person for investigation of criminal activity.[168] The drug courier profile is a loosely formulated, unwritten checklist of characteristics or traits which narcotics agents believe are common to persons who traffic in illegal drugs.[169] Among the recurring elements are travel from drug "source cities" or travel to major drug "use" cities; unusual nervousness; intense scanning of the terminal area; travel with very little luggage; use of one-way tickets purchased with small bills; travel under an alias; and placing a telephone call immediately upon arrival.[170]

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161. 630 F.2d 789 (10th Cir. 1980).

162. *Id.* at 790.

163. *Id.* The interrogation was illegal because the officer had failed to provide Leonard his *Miranda* warnings. *Id.*

164. *Id.* at 791.

165. *See supra* note 151 and accompanying text.

166. 630 F.2d at 791.

167. 703 F.2d 1213 (10th Cir.), *cert. denied*, 104 S. Ct. 484 (1983).

168. 703 F.2d at 1218.

169. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1980) (Stewart, J., concurring).

170. *See* United States v. Elmore, 595 F.2d 1036, 1039 n.3 (5th Cir. 1979), *cert. denied*, 447

A. *Supreme Court Drug Courier Profile Cases*

The Court's first decision involving the use of the drug courier profile was *United States v. Mendenhall*.[171] Although there was no majority opinion in *Mendenhall*, Justice Powell, writing for three members of the Court, stated that in light of the training of the DEA agents and the matching of Ms. Mendenhall's conduct with that of the drug courier profile, the DEA agents had a reasonable and articulable suspicion of criminal activity sufficient to justify a *Terry* stop.[172] Justice Powell emphasized that it was the agents' experience which validated use of the drug courier profile to single Mendenhall out for questioning; reliance on the profile alone would probably have been an insufficient basis to initiate a *Terry* stop.[173] In a later case, *Reid v. Georgia*,[174] the Court again rejected the sufficiency of the drug courier profile ex proprio vigore as a basis for establishing the articulable, reasonable suspicion necessary for a *Terry* stop. *Reid* involved two travelers who fit the drug courier profile, but who did not otherwise act in a furtive or unusual manner.[175] The Court held that the agent could not, as a matter of law, have reasonably suspected the defendant of criminal activity on the basis of the observed circumstances[176] because the circumstances at best supported a "hunch" that the defendant was transporting narcotics.[177] Then, in *Florida v. Royer*,[178] a plurality of the Court, moving away from *Mendenhall* and *Reid*, apparently disagreed with a state appellate court's conclusion that mere similarity with the contents of a drug courier profile cannot establish the articulable basis for the reasonable suspicion required to justify a *Terry* stop.[179]

B. *Previous Tenth Circuit Drug Courier Profile Cases*

The Tenth Circuit had decided one drug courier profile case prior to *McCranie*. In *United States v. MacDonald*,[180] the court determined that the articulable suspicion required to justify a *Terry* investigatory detention was established when the defendant displayed the following "profile" characteristics: 1) checking of luggage at an airport which was not the defendant's final destination; 2) cash payment for a one-way standby ticket; 3) flight emanating from a drug source city; and 4) the defendant appeared nervous and did not approach the luggage claim area but directly left the termi-

U.S. 910 (1980). *Accord* United States v. Mendenhall, 446 U.S. 544, 547 n.1 (1980) (Stewart, J., concurring).

171. 446 U.S. 544 (1980).

172. *Id.* at 565 (Powell, J., concurring).

173. *Id.* at 565 n.6.

174. 448 U.S. 438 (1980).

175. *Id.* at 441.

176. The only behavior which deviated from that of ordinary travelers was that one petitioner occasionally looked backward at the other. *Id.*

177. *Id.*

178. 103 S. Ct. 1319 (1983).

179. *Compare* 103 S. Ct. at 1326 (plurality opinion) (evidence that defendant fit drug courier profile sufficient to justify detention) *with* Royer v. State, 389 So.2d 1007, 1019 (Fla. Dist. Ct. App. 1980) (rehearing en banc) (drug courier profile insufficient basis for detention), *aff'd sub nom.* Florida v. Royer, 103 S. Ct. 1319 (1983).

180. 670 F.2d 910 (10th Cir. 1981).

nal.[181] Although the court did not evaluate the sufficiency of the profile ex proprio vigore in establishing reasonable suspicion, its approach—which emphasized that reasonable suspicion was established by adding the agent's experience to the traveler's correlation with the drug courier profile[182]—closely paralleled that of Justice Powell in *United States v. Mendenhall*.[183]

C. McCranie v. United States

When DEA agents observed McCranie disembarking from a plane at the Atlanta airport, he seemed to fit the drug courier profile in a number of respects.[184] Based on this observation, the agent investigated further and, after learning that McCranie was flying on a one-way ticket from a "drug source" city in Florida, accosted McCranie and requested an interview.[185] During the interview, the agent accused McCranie of carrying drugs and requested permission to search McCranie's luggage.[186] McCranie became nervous and refused the requested permission, whereupon the agent terminated the interview and informed McCranie that other agents would meet him at his destination.[187]

The agent then notified a fellow DEA agent in Tulsa (McCranie's destination) of his suspicions about McCranie, also informing the other agent that investigation following the interview had revealed that McCranie had a prior criminal record which included marijuana convictions.[188] Upon arrival and after retrieving his luggage, McCranie consented to an interview with a DEA agent who was accompanied by a Tulsa policeman.[189] McCranie was then given his *Miranda* advisements.[190] After he refused to permit a search of his luggage, a sniffing dog (and three more policemen) were summoned.[191] The dog was not trained in narcotics sniffing, but nonetheless selected McCranie's suitcase.[192] McCranie was then permitted to leave, but was later arrested and convicted when a search pursuant to warrant revealed that his suitcase contained cocaine.[193]

On appeal, McCranie argued that he was "seized" for fourth amendment purposes in the Tulsa Airport, and that the seizure was not supported by a reasonable, articulable suspicion, but only by the DEA agents' hunches.[194] He conceded that the dog's signals provided reasonable suspi-

181. *Id.* at 913.
182. *See id.*
183. *See supra* notes 171-74 and accompanying text.
184. The "suspicious" characteristics exhibited by McCranie included: 1) flying on a one-way ticket; 2) a flight emanating from a major drug source city, Ft. Myers, Florida; and 3) McCranie's apparent nervousness. United States v. McCranie, 703 F.2d 1213, 1215 (10th Cir.), *cert. denied*, 104 S. Ct. 484 (1983).
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 1216. McCranie was convicted for violating 18 U.S.C. § 841(a)(1) (1982).
194. 703 F.2d at 1216.

cion or probable cause, but argued that because these signals came after he and his suitcase had been illegally seized, the evidence obtained as a result of that seizure should have been suppressed.[195]

In an opinion by Judge Doyle, the Tenth Circuit, with Judge McKay dissenting, held that McCranie presented no fourth amendment violation because he was not seized in either Atlanta or Tulsa.[196] Because the police did not make an overt display of force, did not seize McCranie's wallet, move him from a public area, or detain him for a lengthy period, the court characterized the encounters as mere police-citizen contacts to which the fourth amendment does not apply.[197] The majority held that the circumstances of the detentions would not have indicated to a reasonable person that he or she was in custody and under official compulsion to answer questions.[198] Thus, any evidence which was discovered was not discovered pursuant to an illegal search.

The court held alternatively that even if the Tulsa encounter was a seizure, the participating agent had the reasonable suspicion necessary to make a *Terry* stop.[199] The reasonable suspicion was provided by the match between McCranie's conduct and some of the drug courier profile characteristics, in conjunction with the discovery of McCranie's criminal record.[200] The court stated that McCranie's behavior would not, by itself, have supported seizure, but that the drug courier profile characteristics combined with his criminal record did give rise to reasonable suspicion.[201]

Judge McKay filed a blistering dissent. For Judge McKay, the offensive note in the seizure and search was the use of the drug courier profile. He characterized the use of the profile as a "prime example of organized enforcement efforts that are rapidly eroding our protection against unwarranted, arbitrary intrusions of public officials."[202] Judge McKay stressed that the courts know little or nothing about the characteristics making up the profile, the standards that guide its application, or the probability that the profile incorporates a racial bias not amenable to judicial review.[203]

According to the dissent, McCranie's alleged drug courier characteristics could not have provided reasonable suspicion, much less probable cause, because these characteristics are indistinguishable from the traits exhibited by many perfectly innocent travelers.[204] Judge McKay also noted that even federal judges might become nervous when accosted by DEA agents.[205] Further, the defendant's criminal record should not have been permitted to add to the quality of the agent's suspicions "unless people who have previously

195. *Id.*
196. *Id.* at 1218.
197. *Id.* at 1217-18.
198. *Id.*
199. *Id.* at 1218.
200. *Id.*
201. *Id.*
202. *Id.* at 1218-19 (McKay, J., dissenting).
203. *Id.* at 1218-19 (citing United States v. Vasquez, 612 F.2d 1338, 1353 n.10 (2d Cir. 1979) (Oakes, J., dissenting)).
204. *See* 703 F.2d at 1219 (McKay, J., dissenting).
205. *Id.*

been arrested are excepted from Fourth Amendment protection."[206] Judge McKay found that McCranie had been "seized" as he was about to leave the Tulsa Airport, because a reasonable person in his position would have believed that he was not free to leave.[207] Thus, because the seizure was not supported by reasonable suspicion, the evidence discovered by the sniffing dog was tainted and therefore subject to suppression.[208]

### D. *Implications of* McCranie

In *McCranie*, the court seemed to follow the Supreme Court's reasoning in *Reid v. Georgia*[209] by rejecting a person's similarity to the drug courier profile as an independently sufficient basis for a *Terry* stop.[210] This appears to be a retreat from *MacDonald*, where the court found that similarity to the drug courier profile, in light of the agent's experience in observing drug peddlers, was sufficient to provide the reasonable suspicion necessary for a *Terry* stop.[211] It should be noted, however, that even if *McCranie* is a retreat from *MacDonald* the "something more" than the drug profile now required for a reasonable suspicion is not very much at all; in *McCranie*, the defendant's criminal record was sufficient.

## VII. *LINAM V. GRIFFIN*: THE DOUBLE JEOPARDY CLAUSE AND HABITUAL CRIMINAL ADJUDICATIONS

Pursuant to New Mexico's original habitual criminal statute,[212] when a defendant with prior felony convictions was again convicted of a felony, the district attorney could file a supplemental information seeking an enhanced sentence based on the number of felony convictions.[213] The court was then required to hold a jury hearing on the issue of whether the defendant had in fact been convicted of the alleged prior felonies.[214] If the jury found that the defendant did in fact commit the prior felonies as alleged, the judge was required to impose an enhanced sentence for the underlying felony conviction.[215]

Linam, a thrice convicted felon, was convicted of two counts of forgery and, after an habitual offender hearing, was given a life sentence pursuant to the enhanced punishment provisions of New Mexico's habitual criminal statute.[216] On appeal to the New Mexico Supreme Court, Linam argued that

206. *Id.*

207. *Id.* at 1220. Judge McKay noted that a person who has received *Miranda* warnings and who is the object of concern of four armed policemen would not reasonably feel free to leave. *Id.*

208. *Id.*

209. 448 U.S. 438 (1980).

210. *See supra* notes 200-01 and accompanying text.

211. *See supra* notes 180-83 and accompanying text.

212. N.M. STAT. ANN. § 31-18-5 (1978) (repealed 1977). A similar statute, which became effective in 1979, is codified in N.M. STAT. ANN. § 31-18-17 (Supp. 1981).

213. N.M. STAT. ANN. § 31-18-7 (1978) (repealed 1977). A similar statute, which became effective in 1979, is codified in N.M. STAT. ANN. § 31-18-20 (Supp. 1981).

214. N.M. STAT. ANN. § 31-18-7 (1978) (repealed 1977).

215. *Id.*

216. Linam v. Griffin, 685 F.2d 369, 370-71 (10th Cir. 1982).

the habitual offender statute should be construed to require proof that each prior felony was committed after conviction for the immediately preceding felony.[217] The prosecution had not presented evidence on the dates of Linam's prior felony convictions because earlier constructions and the plain language of the statute did not so require.[218] The New Mexico Supreme Court adopted Linam's argument and construed the enhanced sentencing statute to require proof of the sequence of prior felonies.[219] Linam's case was remanded to the trial court for a second hearing during which the prosecution would have an opportunity to supply the newly-required evidence of the dates of the prior felonies.[220] On remand, Linam was given a life sentence.[221]

Following exhaustion of state post-conviction relief procedures, Linam filed a habeas petition with the federal district court, arguing that the rehearing violated his fourteenth amendment right not to be subjected to double jeopardy.[222] Linam argued that because the New Mexico Supreme Court had stated that there was "no substantial evidence" to support the original enhanced sentence,[223] the double jeopardy clause barred his retrial.[224] Linam relied on the United States Supreme Court decision in *Burks v. United States*,[225] which held that where a conviction is reversed by an appellate court on the ground of insufficient evidence, the defendant may not be retried.[226] The district court rejected Linam's habeas petition, and he appealed to the Tenth Circuit.

The Tenth Circuit, in *Linam v. Griffin*,[227] rejected the proffered analogy to *Burks* and affirmed the lower court's dismissal of Linam's habeas petition.[228] The court emphasized that prior to Linam's state court challenge to the evidentiary requirements of New Mexico's enhanced sentencing statute, New Mexico courts had not required proof of the date of conviction for prior felonies.[229] Linam's conviction was not reversed because the prosecution put on all the evidence it had and came up short, or because there was negligent failure to carry the burden of proof.[230] In Judge Doyle's view, the reversal of Linam's conviction was caused by something more akin to trial error than a true inadequacy of evidence.[231] Because reversal for trial error does not subject a person to the risk of twice being at the mercy of the state's presenta-

217. State v. Linam, 93 N.M. 307, 307, 600 P.2d 253, 253, *cert. denied*, 444 U.S. 846 (1979).
218. *Id.* at 310, 600 P.2d at 256.
219. *Id.* at 309, 600 P.2d at 255.
220. *Id.* at 310, 600 P.2d at 256.
221. Linam v. Griffin, 685 F.2d 369, 371 (10th Cir. 1982).
222. *Id.* at 371. *See* Benton v. Maryland, 395 U.S. 784 (1969) (recognizing that fifth amendment is applicable to states via due process clause of fourteenth amendment).
223. State v. Linam, 93 N.M. 307, 310, 600 P.2d 253, 256, *cert. denied*, 444 U.S. 846 (1979).
224. 685 F.2d at 373.
225. 437 U.S. 1 (1978).
226. *Id.* at 18. The defendant may not be retried because reversal for insufficient evidence is an implicit aquittal on the charge. *See id.* at 16-18.
227. 685 F.2d 369 (10th Cir. 1982).
228. *Id.* at 372.
229. *Id.* at 373.
230. *Id.* at 373-74.
231. *Id.* at 373.

tion of its full case, double jeopardy did not bar Linam's retrial.[232]

The Tenth Circuit also held, as an alternative basis for its decision, that double jeopardy protections were inapplicable during Linam's rehearing because New Mexico's enhanced sentencing proceeding was merely part of the sentencing phase of trial, and not an adjudication of guilt or innocence to which double jeopardy protections traditionally apply.[233] Judge Anderson[234] refrained from joining this portion of the opinion.[235]

In reaching its alternative holding, the Tenth Circuit relied on the Supreme Court's decision in *DiFrancesco v. United States*,[236] which the Tenth Circuit read as holding that a criminal sentence, once pronounced, is not to be accorded finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal.[237] The court emphasized that New Mexico's enhanced sentencing proceeding did not involve conviction for a distinct crime and should not be equated with a judgment on the issue of guilt or innocence; rather, the proceeding was little more than a procedural formality required to establish that the defendant had committed prior felonies as shown by the public records.[238] Given its purely formal, almost perfunctory quality, New Mexico's habitual criminal proceeding was not, in the court's view, "[t]he kind of adjudication that is referred to in the fifth amendment."[239]

Judge Anderson, writing separately, concurred in the majority's denial of habeas on the basis of the trial error analysis, but sharply disagreed with the majority's application of *DiFrancesco*. In Judge Anderson's view, *Bullington v. Missouri*,[240] decided by the Supreme Court almost a half year after *DiFrancesco*, compelled the conclusion that the double jeopardy clause was implicated by New Mexico's habitual criminal proceeding.[241]

Bullington was convicted of capital murder.[242] Under Missouri's then existing statutory scheme, following a decision on guilt or innocence in a capital case a jury was required to make the sentencing determination and select between the death penalty and life imprisonment.[243] In this separate sentencing proceeding, which involved a virtual full scale trial on the existence of aggravating factors justifying capital punishment,[244] the jury failed to find the statutory aggravating circumstances and sentenced Bullington to life imprisonment.[245] Subsequently, Bullington was granted a new trial due

232. *Id.* at 374 (citing Burks v. United States, 437 U.S. 1, 15-16 (1978)).
233. 685 F.2d at 376.
234. Honorable Aldon J. Anderson, Chief Judge, United States District Court for the District of Utah, sitting by designation.
235. 685 F.2d at 376 (Anderson, J., concurring).
236. 449 U.S. 117 (1980).
237. 685 F.2d at 374.
238. *See id.* at 373, 376.
239. *Id.* at 376.
240. 451 U.S. 430 (1981).
241. 685 F.2d at 376 (Anderson, J., concurring).
242. 451 U.S. at 435.
243. *See* MO. REV. STAT. § 565.006 (1978) (repealed 1983).
244. 451 U.S. at 438.
245. *Id.* at 436.

to certain sixth amendment violations.[246] The Supreme Court held that the double jeopardy clause prohibited the prosecution from seeking the death penalty upon retrial.[247] Essentially, the original jury's decision to sentence Bullington to life imprisonment after an effective trial on whether Bullington's behavior required imposition of the death penalty constituted a finding that Bullington was innocent of engaging in conduct punishable by death.[248]

Judge Anderson opined that New Mexico's enhanced sentencing proceeding was sufficiently similar to the sentencing procedure analyzed in *Bullington* to implicate the double jeopardy clause.[249] Judge Anderson emphasized that the sentencing proceeding was conducted like a trial, with the defendant entitled to be present at the proceedings, to have counsel, and to have the issues tried to a jury.[250] Further, the prosecution was required to prove essential issues of fact, and was most probably required to meet a burden of proof.[251] The trial nature of the proceeding triggered Linam's double jeopardy protections;[252] the majority's failure to recognize this crucial thrust of *Bullington* necessitated Judge Anderson's separate opinion.

## VIII. OTHER TENTH CIRCUIT DOUBLE JEOPARDY DEVELOPMENTS

In *Abney v. United States*,[253] the Supreme Court held that a trial court's pretrial order denying a motion to dismiss on grounds of double jeopardy was a "final decision" and thus immediately appealable.[254] Typically, filing an *Abney* appeal will result in a stay of trial court proceedings.[255] In *United States v. Hines*,[256] the Tenth Circuit recognized that where a "district court has considered a double jeopardy claim after a hearing and, for substantial reasons given, finds the claim to be frivolous, the district court should not be divested of jurisdiction by an *Abney* appeal."[257] In that circumstance, both the district court and court of appeals will have jurisdiction to proceed.[258]

In *United States v. Puckett*,[259] the Tenth Circuit declared that, although the "same evidence" test is still the test used by the court in determining whether two statutes proscribe the same offense for double jeopardy purposes, the "totality of the circumstances" test might be adopted in the appro-

246. *Id.*

247. *Id.* at 446.

248. The Court stated: "*Because* the sentencing proceeding at petitioner's . . . trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one aquitted by a jury is also available to him, with respect to the death penalty, at his retrial." *Id.* (emphasis supplied, footnote omitted).

249. 685 F.2d at 377 (Anderson, J., concurring).

250. *Id.*

251. *Id.* at 378-79.

252. *Id.* at 379. *Accord* Bullard v. Estelle, 665 F.2d 1347 (5th Cir. 1982).

253. 431 U.S. 651 (1977).

254. *Id.* at 662.

255. *See* United States v. Hines, 689 F.2d 934, 936 (10th Cir. 1982).

256. 689 F.2d 934 (10th Cir. 1982).

257. *Id.* at 937.

258. *See id.* at 938.

259. 692 F.2d 663 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 579 (1983).

priate case.[260] Under the "same evidence" or "*Blockburger*"[261] test, two offenses are identical for double jeopardy purposes only if the facts alleged in one would sustain a conviction if offered in support of the other.[262] The court noted that the same evidence test has been sharply criticized in recent years as an inadequate measurement of double jeopardy when applied to multiple prosecution for conspiracy charges.[263] The Sixth and Eighth Circuits have rejected the same evidence test in favor of a totality of the circumstances approach in multiple conspiracy prosecution.[264] Under this approach, double jeopardy protections are implicated unless the prosecution can demonstrate that the criminal agreements in separate conspiracy prosecutions are "indeed separate and distinct."[265]

## IX. EFFECTIVE ASSISTANCE OF COUNSEL

During the period covered by this survey, the Tenth Circuit Court of Appeals heard three significant cases involving the sixth amendment[266] right to effective assistance of counsel. The three, *United States v. Golub* (*Golub II*),[267] *Griffin v. Winans*,[268] and *United States v. Verdin*,[269] apply and expand the principles set forth in *United States v. Golub*[270] (*Golub I*), an earlier Tenth Circuit consideration of a defendant's sixth amendment claims.

### A. United States v. Golub (Golub II)

The Tenth Circuit Court of Appeals heard *Golub I* in 1980. In *Golub I*, Robert Golub appealed his mail fraud convictions,[271] claiming he was denied adequate assistance of counsel at trial because his trial attorney, Sheldon Emeson, was not skilled in criminal law, and further had not had adequate time to prepare.[272] Golub had originally retained another attorney; two weeks before trial, however, the attorney was permitted to withdraw because Golub was uncooperative, had not paid his fees, and, most importantly, because Golub had misled the attorney.[273] Golub then retained Emeson, his uncle by marriage.[274] Emeson attempted to obtain a

260. *Id.* at 668.
261. Blockburger v. United States, 284 U.S. 229 (1932).
262. 692 F.2d at 667.
263. *Id.* at 668.
264. *See* United States v. Jabarra, 644 F.2d 574 (6th Cir. 1981); United States v. Tercero, 580 F.2d 312 (8th Cir. 1978).
265. United States v. Tercero, 580 F.2d 312, 317 (5th Cir. 1978).
266. U.S. CONST., amend. VI.
267. 694 F.2d 207 (10th Cir. 1982).
268. 684 F.2d 686 (10th Cir. 1982).
269. No. 81-2346, slip op. (10th Cir. Mar. 21, 1983).
270. 638 F.2d 185 (10th Cir. 1980), *rev'd*, 694 F.2d 207 (10th Cir. 1982). Other recent Tenth Circuit opinions concerned with the effective assistance of counsel are United States v. King, 664 F.2d 1171 (10th Cir. 1981) and United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982), *cert. granted*, 103 S. Ct. 1182 (1983).
271. Golub was found guilty of violating 18 U.S.C. §§ 1341, 2314 (1982). 638 F.2d at 186.
272. *Golub I*, 638 F.2d at 188.
273. *Id.* Golub did not oppose the motion to withdraw. United States v. Golub, 694 F.2d 207, 208 (10th Cir. 1982) (*Golub II*).
274. *Golub I*, 638 F.2d at 188.

continuance by telephone, which the trial judge denied[275] in accordance with statements made at the time Golub's first lawyer was permitted to withdraw.[276] The case then proceeded to trial as scheduled and, as noted, Golub was convicted.

*Golub I* originally reversed Golub's convictions and ordered a new trial.[277] The Tenth Circuit found that Emeson performed adequately at trial, but had not been given adequate time to prepare for trial in light of the case's complexity, the geographical dispersion of witnesses, and his unfamiliarity with criminal law.[278] The government then filed a motion for rehearing, tendering an affidavit from the trial court which stated that Golub had received above average assistance of counsel.[279] The Tenth Circuit granted the motion, and on rehearing en banc stayed *Golub I*'s order for a new trial, instead ordering the trial court to hold an evidentiary hearing on whether Emeson's forensic performance was inadequate and whether Emeson's trial preparation time was inadequate.[280] The evidentiary hearing was held over a period of nine months to ensure that Golub would have an ample opportunity to present evidence of inadequate assistance.[281] After hearing Golub's evidence, including expert witnesses, the trial judge found that Emeson's forensic performance was extremely capable,[282] and that no prejudice resulted from the short trial preparation time.[283] The review of the evidentiary hearing and the trial court's findings formed the basis for the second *United States v. Golub*[284] (*Golub II*).

Applying the standards enunciated in the earlier Tenth Circuit decision *Dyer v. Crisp*,[285] *Golub II*, over Judge Doyle's dissent, found Emeson's forensic performance constitutionally adequate. Under *Dyer*, the court does not look for a flawless defense, but rather one which reflects the skill of a reasonably competent defense attorney.[286] Because the record at the evidentiary hearing indicated that Emeson's performance satisfied that standard, no constitutional right was violated by the manner in which Golub's counsel conducted the defense.[287]

The Tenth Circuit then had to consider whether the trial court had violated Golub's sixth amendment rights by denying Emeson adequate time to prepare for trial. The factors used by the Tenth Circuit to determine

275. *Id.* at 186.

276. At the withdrawal hearing, the trial judge told Golub that the trial would proceed as scheduled, with or without counsel. *Id.*

277. *Id.* at 190.

278. *Id.* at 189.

279. *Golub II*, 694 F.2d at 209.

280. *Id.* at 210.

281. *Id.* at 210-11.

282. *Id.* at 211.

283. *Id.* at 212.

284. 694 F.2d 207 (10th Cir. 1982).

285. 613 F.2d 275 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945 (1980).

286. 613 F.2d at 278.

287. *Golub II*, 694 F.2d at 214. The court noted that the adequacy of trial counsel's representation had to be determined, at least in part, by reference to the defendant's behavior. Golub's uncooperativesness had, to some extent, contributed to the barrenness of his defense. *See id.*

whether given preparation time was constitutionally sufficient were: 1) the time allowed to investigate and prepare; 2) counsel's experience; 3) the severity of the offenses charged; 4) the complexity of the defense; and 5) counsel's accessibility to witnesses.[288] The majority found that these factors comported with a Supreme Court admonition that sixth amendment protections are not violated unless an asserted interference with the right to counsel either prejudices, or threatens to prejudice, the effectiveness of counsel's representation.[289] Thus, unless the facts of the particular case demonstrate that the defendant was actually prejudiced by the time allowed for preparation, or that there was a substantial threat of prejudice, the trial court has not deprived the defendant's sixth amendment rights.[290] Because Golub was unable to show, through the evidentiary hearing or otherwise, how he had been prejudiced by the short trial preparation period, the Tenth Circuit, over Judge Doyle's dissent, reversed and vacated *Golub I*.[291]

Judge Doyle dissented because he found that the trial court's actions had denied Golub effective assistance of counsel. The dissent emphasized that sophisticated mail fraud cases are inherently complex and difficult for both prosecution and defense.[292] This complexity, which by itself might have mandated a longer preparation period, was exacerbated by Emeson's unfamiliarity with the Federal Rules of Criminal Procedure.[293] Further, the trial court had failed to advise Golub of his right to appointed counsel,[294] thus virtually forcing him to retain counsel inexperienced in a federal court defense of a serious and difficult federal charge.[295] Finally, Judge Doyle stressed that the majority's reliance on the absence of prejudice wrongly focused the constitutional inquiry. In *United States v. Morrison*,[296] which the majority relied on in articulating its absence of prejudice standard,[297] the Court addressed whether police interference with the relationship between a defendant and her counsel justified dismissal of an indictment.[298] The Court did *not* decide whether proof of prejudice from prosecutorial interfer-

288. 694 F.2d at 214. These factors were originally announced in *Golub I*. *See* 638 F.2d at 189 (citing Wolfs v. Britton, 509 F.2d 304 (8th Cir. 1975)).

289. 694 F.2d at 214, (quoting United States v. King, 664 F.2d 1171, 1173 (10th Cir. 1981)) (quoting United States v. Morrison, 449 U.S. 361, 365 (1981)). *Accord* United States v. Cronic, 675 F.2d 1126, 1128 (10th Cir. 1982), *cert. granted*, 103 S. Ct. 1182 (1983).

290. *Golub II*, 694 F.2d at 215.

291. *Id.* at 216.

292. *Id.* at 220-21 (Doyle, J., dissenting).

293. *See id.* at 218 (Emeson's failure to file written motion for continuance indicative of lack of familiarity with Federal Rules of Criminal Procedure, and therefore indicative of Emeson's lack of preparation).

294. *Id.* at 219. FED. R. CRIM. P. 44(a) provides: "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment." *See also* 18 U.S.C. § 3006A (1982).

295. *See* 694 F.2d at 218-20 (Doyle, J., dissenting). Judge Doyle observed that Emeson was unable to obtain any of his colleagues to represent Golub, given the complex case and the short preparation period, *id.* at 218 and that Emerson's request for a continuance reflected his own belief that the preparation period was inadequate. *See id.*

296. 449 U.S. 361 (1981).

297. *See supra* notes 288-89 and accompanying text.

298. 449 U.S. at 363-64.

ence was necessary to *establish* a sixth amendment violation.[299] Judge Doyle flatly rejected the majority's position:

> [T]he presence or absence of prejudice should not be and cannot be the test of the violation of the Constitution. In an inadequacy of counsel case to require proof that a different result would have occurred had able counsel been present is not a true test of the unconstitutionality of the action.[300]

Accordingly, the dissent would have remanded the case for a new trial so that Golub could obtain effective counsel.[301]

B. Griffin v. Winans

The question presented to the Tenth Circuit in *Griffin v. Winans*[302] was whether the defendant's representation by a relatively inexperienced alcoholic attorney violated the sixth amendment right to effective counsel, thereby justifying the federal district court's grant of habeas relief.[303] Habeas relief was necessary because New Mexico's trial and appellate courts had rejected Griffin's sixth amendment claims because his attorney's conduct did not cause the trial to become a "sham and mockery" of justice.[304]

In affirming the grant of habeas relief, the Tenth Circuit observed that the trial court had properly conducted an evidentiary hearing, and had properly rejected New Mexico's application of the sham and mockery standard. The court recognized that although federal courts are bound by state court findings of fact absent a statutory exception,[305] in this case the state courts had made no findings of fact.[306] Thus, the federal district court's evidentiary hearing was proper. Similarly, the federal district court had properly rejected use of the sham and mockery standard, recognizing that the Tenth Circuit has adopted the more stringent "reasonably competent counsel" standard for assessing an asserted violation of a defendant's sixth amendment right.[307]

The district court found that Griffin's representation was constitutionally inadequate because his lawyer was unprepared, was forensically ineffective, and was chronically intoxicated.[308] Reviewing the district court's

299. *Id.* at 364.

300. 694 F.2d at 221 (Doyle, J., dissenting).

301. *Id.*

302. 684 F.2d 686 (10th Cir. 1982).

303. *Id.* at 687.

304. *Id.* at 688 & n.2 (quoting unpublished New Mexico trial, appellate court opinions).

305. *Id.* at 688 (citing Sumner v. Mata, 455 U.S. 591 (1982)). *See* 28 U.S.C. § 2254(d) (1982).

306. *See* 684 F.2d at 688.

307. *Id.* at 689. The "reasonably competent counsel" standard was adopted in Dyer v. Crisp, 613 F.2d 275 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945 (1980). New Mexico had alleged that its courts had in fact applied the reasonable counsel standard, and that the "sham and mockery" language actually used was "unfortunate semantics." 648 F.2d at 689. The Tenth Circuit agreed that the district court had properly rejected this argument, pointing to the testimony of the trial judge concerning the standard he had applied and the explicit language of the state appellate opinion. *See id.* New Mexico has since adopted the reasonably competent counsel standard. State v. Orona, 97 N.M. 232, 638 P.2d 1077 (1982).

308. 684 F.2d at 689 n.4.

factual conclusions under the clearly erroneous standard,[309] the Tenth Circuit found the district court's findings supported by substantial evidence and therefore acceptable.[310] In light of those findings, the Tenth Circuit agreed that the district court had properly found that the defendant's sixth amendment rights were violated, and had properly granted the requested habeas relief.[311]

### C. United States v. Verdin

*Winans* demonstrates that having inadequate, inexperienced, and ill-prepared counsel violates a defendant's sixth amendment right to effective assistance of counsel. In *United States v. Verdin*,[312] the Tenth Circuit articulated a distinction between ineffective counsel and counsel using unsuccessful trial strategy. In *Verdin*, counsel decided not to impeach an identifying witness and not to call alibi witnesses because, according to counsel, this testimony would have been cumulative and inconclusive.[313] The Tenth Circuit found that the decision to refrain from calling these witnesses was a mere strategic decision, which could not support a claim of constitutionally ineffective counsel.[314]

## X. EXHAUSTION OF STATE REMEDIES AS PREREQUISITE TO FEDERAL HABEAS RELIEF

Under the recent United States Supreme Court ruling *Rose v. Lundy*,[315] habeas corpus petitioners must exhaust all of their claims at the state level before a federal district court can hear a petition for habeas corpus relief.[316] Prior to *Lundy*, the Tenth Circuit had held that where a petition presented both exhausted and unexhausted (or mixed) claims, the exhausted claims could be considered, but the unexhausted claims had to be dismissed.[317] This rule was changed in *Jones v. Hess*[318] to conform to *Lundy*'s standards.[319]

Jones was convicted by an Oklahoma jury in August, 1971 on two counts of murder and one count of shooting with intent to kill.[320] The Oklahoma Court of Criminal Appeals affirmed the convictions in May, 1973.[321] Jones then filed a petition for a writ of habeas corpus in Pittsburg County District Court in March, 1976.[322] The district court denied the ap-

309. *Id.* at 690.
310. *Id.*
311. *Id.*
312. No. 81-2346 (10th Cir. Mar. 21, 1983).
313. *Id.* at 3.
314. *Id.*
315. 455 U.S. 509 (1982).
316. *Id.* at 510.
317. *E.g.*, Smith v. Gaffney, 462 F.2d 663, 665 (10th Cir. 1972); Whiteley v. Meacham, 416 F.2d 36, 39 (10th Cir. 1969), *rev'd on other grounds sub nom.* Whitely v. Warden, 401 U.S. 560 (1971); Watson v. Patterson, 358 F.2d 297, 298 (10th Cir. 1966), *cert. denied*, 385 U.S. 876 (1966).
318. 681 F.2d 688 (10th Cir. 1982).
319. *See id.* at 695.
320. *Id.* at 685.
321. Jones v. State, 509 P.2d 924, 925-27 (Okla. Crim. App. 1973).
322. 681 F.2d at 689.

plication in September, 1977 after an evidentiary hearing.[323] The Oklahoma Court of Criminal Appeals finally affirmed the district court's denial of post-conviction relief on April 10, 1979.[324] In May, 1979, Jones filed a habeas corpus petition with the federal district court, which denied the petition in 1980 with respect to all claims except one relating to judicial bias and misconduct.[325] This claim was dismissed for failure to exhaust state court remedies.[326] Jones then appealed to the Tenth Circuit Court of Appeals.[327] Judge Holloway, writing for a unanimous court, observed that petitioner's claim of prejudicial ex parte communication between the trial judge and prosecution "if accepted, would present a very serious and disturbing challenge to the constitutionality of Jones's convictions, grounded on the constitutional right to a fair trial and the Due Process Clause of the Fourteenth Amendment."[328] The district court, however, had not reached the merits of the claim, holding that because the claim was not exhausted in the state courts it could not be considered.[329] The initial consideration on appeal was the propriety of that ruling.[330]

Jones asserted two bases for error in the district court's ruling. First, he argued that a general claim of bias had been presented to the state courts, and the additional evidence presented to the district court was merely additional evidence of bias.[331] Remanding his claim, Jones argued, would require him to file repetitious applications, in violation of *Wilwording v. Swenson*.[332] Alternately, Jones argued, because he had been incarcerated since 1971, the amount of time already spent in litigation and the seriousness of the constitutional violation made his case sufficiently exceptional to permit a relaxation of the exhaustion requirement.[333]

Judge Holloway quickly disposed of Jones' second argument by reference to the Supreme Court case of *Duckworth v. Serrano*.[334] *Duckworth* rejected the argument that hardship to a petitioner caused by delay, in conjunction with a strong showing of constitutional deprivation, could justify an exception to the exhaustion requirement.[335] The Court held that the only exception to exhaustion occurred when there was no opportunity to obtain redress in state court, or when the deficiencies in available state court procedures rendered resort to state court futile.[336] The Tenth Circuit found Oklahoma's post-conviction proceedings adequate,[337] so that Jones' case did

323. *Id.*
324. *Id.* at 690.
325. *Id.* at 690-91.
326. *Id.* at 691, 693.
327. *Id.* at 691.
328. *Id.* at 692.
329. *Id.* at 693.
330. *Id.*
331. *Id.*
332. 404 U.S. 249 (1971). *See* 681 F.2d at 693.
333. 681 F.2d at 693.
334. 454 U.S. 1 (1981).
335. *Id.* at 4.
336. *Id.* at 3.
337. *See* 681 F.2d at 694 n.7.

not fall within the exceptions to exhaustion permitted by *Duckworth*.[338]

The Tenth Circuit also rejected Jones' argument that he had in fact exhausted his judicial bias claim. The court observed that when newly discovered evidence, such as that presented by Jones, placed a claim in a "significantly different posture," the claim must be heard by the state courts prior to a federal habeas petition.[339] Because Jones' evidence of judicial impropriety was new, and significant,[340] the bias claim was placed in a new, and therefore unexhausted, posture.[341]

After determining that Jones' petition contained mixed claims, the court analyzed *Lundy*'s applicability to Jones' petition. The court noted that in the absence of manifest injustice, it was required to apply the law in effect at the time of decision.[342] Despite Jones' lengthy incarceration, and the further delay resulting from remand, the court felt compelled to apply *Lundy*'s total exhaustion rule.[343] Hence, following remand, Jones would have a choice of exhausting his bias claim, or amending his petition to exclude, and possibly forfeit, the claim.[344]

## XI. EFFECT OF STATE WAIVER OF HABEAS EXHAUSTION REQUIREMENTS

*Naranjo v. Ricketts*[345] represents the Tenth Circuit's entry into the circuit court debate over whether a federal court should assume jurisdiction over a habeas claim when the state attempts to waive the exhaustion requirement.[346] *Naranjo* held that the general rule in the Tenth Circuit will be to require exhaustion regardless of the state's attempted waiver.[347]

The appellants in *Naranjo* had been convicted in Colorado of first degree kidnapping and first degree sexual assault.[348] These convictions were modified by the Colorado Supreme Court.[349] The Naranjos then brought a habeas claim to the district court, arguing that the Colorado Supreme Court's modification of their convictions was unconstitutional.[350] After the

338. *Id.* at 694.

339. *Id.*

340. *Id.* Copies of the ex parte communications are reproduced *id.* at 696-99.

341. *Id.*

342. *Id.* at 695 n.9.

343. *Id.* at 695.

344. *Id.* at 695 (citing Rose v. Lundy, 455 U.S. 509, 518-21 (1982)). A case which followed soon after *Jones* is Reed v. Brown, No. 82-1354 (10th Cir. Aug. 3, 1982). The petitioner, Reed, filed a mixed petition for habeas corpus relief presenting exhausted and unexhausted claims. Citing *Lundy*, the Tenth Circuit remanded the case giving Reed the same option as Jones in the earlier case: either amend the petition by deleting the unexhausted claims, thereby risking no further consideration of the unexhausted claims, or first exhaust the remaining unexhausted claims. *Id.* at 2-3 (citing *Jones*, 681 F.2d at 693).

345. 696 F.2d 83 (10th Cir. 1982).

346. *Compare* Batten v. Scurr, 649 F.2d 564, 568-69 (8th Cir. 1981); Jenkins v. Fitzberger, 440 F.2d 1188, 1189 (4th Cir. 1971) (deciding in favor of assuming jurisdiction) *with* Sweet v. Culp, 640 F.2d 233, 237 n.5 (9th Cir. 1981); Gayle v. LeFerre, 613 F.2d 21, 22 n.1 (2d Cir. 1980) (requiring strict compliance with exhaustion doctrine).

347. 696 F.2d at 87.

348. *Id.* at 84.

349. *Id.*

350. *Id.* at 85.

petitions were dismissed with prejudice by the district court for failure to exhaust state remedies, the Tenth Circuit, on appeal, remanded the cases to determine whether the Naranjos' claims had been properly exhausted.[351]

The state attorney general then applied for a rehearing, claiming that because the state had waived the exhaustion requirement, the circuit court could dismiss the case on the merits.[352] The Tenth Circuit declined to do so, stating that although exhaustion was not a jurisdictional prerequisite to federal jurisdiction over a habeas petition[353] protection of the state court's role in the enforcement of federal law required strict enforcement of the exhaustion requirement.[354] In reaching its conclusion, the Tenth Circuit weighed expediency and the efficient use of judicial resources against the need to protect and promote the state's role in preserving constitutional protections, finding the latter to be the more important consideration.[355]

## XII. JUDICIAL REFERENCE TO CO-CONSPIRATORS AT VOIR DIRE

The Tenth Circuit found reversible error in *United States v. Baez*[356] when the trial judge's voir dire included comments about previous guilty pleas of alleged co-conspirators and the possibility that one of those co-conspirators might offer testimony exculpating the defendant.[357] The exculpatory testimony, which was to have come from the defendant's son, never materialized.[358] The other alleged co-conspirator testified and his guilty plea was elicited;[359] the trial court, however, failed to give the required instruction limiting the use of such testimony.[360] The Tenth Circuit found these actions constituted plain error sufficiently prejudicial to overturn the defendant's conviction.[361]

Judge Seymour found the logic of two Fifth Circuit cases directly on point to be controlling.[362] In reversing a conviction where the trial judge had told prospective jurors that the defendant's co-indictees had pled guilty, the Fifth Circuit stated:

> There is no need to advise the jury or its prospective members that someone not in court, not on trial, and not to be tried, has pleaded guilty. The prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participant is

351. *Id.*
352. *Id.*
353. *Id.* at 86.
354. *Id.* at 86 (listing cases).
355. *Id.* at 87.
356. 703 F.2d 453 (10th Cir. 1983).
357. *See id.* at 454-55.
358. The defendant's son did not testify. *Id.* at 455.
359. *Id.*
360. *Id.* A co-defendant's guilty plea does not constitute substantive evidence, *id.* (citing United States v. Halbert, 640 F.2d 1000, 1004 (9th Cir. 1981)), and must be accompanied by a limiting instruction so stating. 703 F.2d at 455 (citing United States v. Halbert, 640 F.2d 1000, 1006-07 (9th Cir. 1981)).
361. 703 F.2d at 455-56. The defendant had been convicted of distributing, and conspiring to distribute phencyclidine (PCP) in violation of 18 U.S.C. §§ 841(a)(1), 846 (1982). 703 F.2d at 454.
362. 703 F.2d at 455 (citing United States v. Vaughn, 546 F.2d 47 (5th Cir. 1977); United States v. Hansen, 544 F.2d 778 (5th Cir. 1977)).

obvious.[363]

Judge Seymour found the error in *Baez* to be even greater than that in the Fifth Circuit cases, because once the defendant's son failed to testify the jury might have readily concluded that the failure to testify was because the son felt he could not "honestly testify in his father's favor."[364] Given the prejudice resulting from the trial judge's conduct, reversal was required.[365]

*David Dansky*
*David Japha*

363. United States v. Hansen, 544 F.2d 778, 780 (5th Cir. 1977), *quoted in Baez*, 703 F.2d at 455.

364. 703 F.2d at 455.

365. *Id.*

# FEDERAL PRACTICE AND PROCEDURE

## OVERVIEW

During the past year, the Tenth Circuit Court of Appeals decided numerous federal practice and procedure cases, the majority of which involved common issues in this area of the law. This brief review of selected cases is intended to assist the practicing attorney in ascertaining the present status of certain federal practice and procedure questions and to provide guidance for further research.

The first part of this article will analyze two decisions which considered jurisdiction issues. One decision concerns the final judgment rule and the other decision concerns a unique twist in the diversity requirement for federal jurisdiction. The second part of the article is comprised of a survey of selected Tenth Circuit decisions in the areas of removal jurisdiction, finality of interlocutory orders, and review of a master's recommendations.

## I. PRECLUSION OF APPELLATE JURISDICTION BY OPTION JUDGMENTS

By statute, the federal circuit courts are vested with appellate jurisdiction over the final decisions of federal district courts.[1] The statute does not define what is "final" for the purpose of appellate jurisdiction. Consequently, the question of finality is often the threshold issue in a case on appeal. Unless a district court judgment is deemed final, an appeal must be dismissed without considering its merits. The Court of Appeals for the Tenth Circuit, on its own motion, addressed the issue of finality in *McKinney v. Gannett Co.*[2]

### A. *The Final Judgment Rule*

Although the wording is original, the final judgment rule in 28 U.S.C. § 1291[3] has existed in the American judicial system since the Judiciary Act of 1789.[4] Today, section 1291 allows appeals only from "final decisions."[5] In 1789, when the final judgment rule was enacted under the Judiciary Act,

1. 28 U.S.C. § 1291 (1982). The statute reads in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." *Id.*

2. 694 F.2d 1240 (10th Cir. 1982). The issue of appellate jurisdiction may be raised at any time during the proceedings and, if the parties fail to raise the question, the court has a duty to determine the issue sua sponte. United States v. Siviglia, 686 F.2d 832, 834-35 (10th Cir. 1981), *cert. denied*, 103 S.Ct. 1902 (1983) (citing Basso v. Utah Power and Light Co., 495 F.2d 906, 909 (10th Cir. 1974)), *quoted in McKinney*, 694 F.2d at 1245-46. The lack of a final judgment in *McKinney* was not raised by the parties on appeal. *Id.*

3. 28 U.S.C. § 1291 (1982).

4. Judiciary Act of 1789, ch. 20, § 21, 1 Stat. 73, 83-84.

5. *See supra* note 1. When originally enacted, section 1291 allowed appeals only from "final judgments or decrees." Judiciary Act of 1789, ch. 20 § 21, 1 Stat. 73, 83-84. The actual origin of the final judgment rule is hidden in the obscure history of appellate procedure in English common law. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 544 (1932).

its underlying purpose was to avoid piecemeal reviews.[6] This remains the primary purpose behind section 1291, although two other policy concerns now affect the resolution of finality questions. The first, prevention of excessive appeals, evolved after the final judgment rule had been enacted.[7] The second, maintaining the appropriate relationship between the trial and appellate courts,[8] is also of relatively modern origin.

A literal reading of section 1291 suggests strict construction even though Congress did not define the term "final."[9] Because of the strict construction suggested by the language of section 1291 and the problems surrounding a determination of what is "final," the Supreme Court and Congress have created exceptions to the rule. One common exception is the provision for appeals from interlocutory orders, found in 18 U.S.C. § 1292.[10] Another exception is the collateral order doctrine set out in *Cohen v. Beneficial Industrial Loan Corp.*[11] Additionally, to avoid the harshness section 1291 may effect appellate courts will use the extraordinary writs of mandamus, prohibition, certiorari, or habeas corpus.[12] These exceptions reflect the general recognition among circuit courts that flexibility is appropriate under section 1291. *McKinney*, however, creates a limitation upon appellate flexibility by concluding that certain relief awarded by a trial court prevents a judgment from becoming a final decision.

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6. United States v. Nixon, 418 U.S. 683, 690 (1974); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950); Cobbledick v. United States, 309 U.S. 323, 325 (1940). *See also* United States v. Feeney, 641 F.2d 821, 824 (10th Cir. 1981) (quoting *Nixon*, 418 U.S. at 690).

7. *See* Crick, *supra* note 5, at 550-51.

8. Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) (quoting Parkinson v. April Industries, Inc., 520 F.2d 650, 654 (2d Cir. 1975)). The phrase "appropriate relationship" refers to the judicial process of allowing the trial court to fully hear and consider a case without the appellate court running interference for the litigants by considering every order issued by the trial court. The trial court's actions are entitled to respect; only upon completion of the entire trial should the appellate court consider the wisdom of the trial court's actions. *See generally* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351-52 (1961).

9. A strict construction is suggested because use of the word "final" indicates a congressional intent to maintain an "appropriate relationship" between trial and appellate courts.

10. 28 U.S.C. § 1292 (1982). Section 1292 appeals usually concern trial court injunctions, *id.* § 1292(a)(1), or unsettled questions of law which should be determined to facilitate proper adjudication on the merits. *Id.* § 1292(b).

11. 337 U.S. 541 (1949). *Cohen* held that appellate jurisdiction existed for interlocutory appeals "which finally determine claims of right separable from, and collateral to, rights asserted in the action, [and which are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. For discussion of a recent Tenth Circuit case, Chavez v. Singer, 698 F.2d 420 (10th Cir. 1983), which addressed the collateral order exception, see *infra* notes 227-237 and accompanying text.

12. *See generally* Crick, *supra* note 5, at 553-54 (general discussion of the purpose and application of each extraordinary writ). An example of the harsh effects of the finality rule is a lower court order that a litigant's trade secrets are discoverable. The appellate court may grant a writ of mandamus to consider the propriety of such an order. *See, e.g.*, Hartley Pen Co. v. United States District Court, 287 F.2d 324 (9th Cir. 1961).

The majority in *McKinney* did not address the harsh effect its dismissal would have on the litigants. The dissent, however, did consider the issue. 694 F.2d at 1251-52 (Logan, J., dissenting).

FED. R. CIV. P. 54(b), allowing appeals from orders not dispositive of the entire case, is a variation of the final judgment rule and not an exception. *See infra* notes 234-36 and accompanying text.

B. McKinney v. Gannett Co.

1. The Facts

*McKinney v. Gannett Co.*[13] arose from a breach of contract action. McKinney and Gannett had entered into an agreement whereby McKinney agreed to sell his two New Mexico newspaper corporations to Gannett in a stock-for-stock exchange.[14] The agreement included a ten-year employment contract with McKinney which required McKinney to contribute his services to one of the newspaper corporations on the proviso McKinney would retain editorial control and that Gannett would compensate McKinney for his services.[15] After three years, the contractual relationship between the parties deteriorated and McKinney instigated suit. The grounds for the action were limited by the district court, through pretrial motions and rulings during trial, to McKinney's claims of breach of contract and fraud, and Gannett's affirmative defenses of waiver and legal excuse for the alleged breach of contract.[16]

The New Mexico district court eventually considered the case in two phases. The first phase concerned liability. The liability issues were heard by a jury which returned special verdicts finding in favor of McKinney on the breach of contract claims and for the defendants on the fraud claim.[17] The second phase concerned an accounting required for effecting an equitable rescission. This accounting was ordered following a post-trial hearing at which McKinney argued that rescission was the only adequate remedy. The district court agreed, stating that any other relief would be "mere patchwork."[18] The court added, however, that to ensure Gannett properly managed the papers during the accounting phase, McKinney did not have to elect rescission until the trial on the accounting was completed.[19]

Upon completion of the accounting phase of the trial, the district court entered judgment providing McKinney sixty days from the expiration of the time to appeal, or sixty days from a Tenth Circuit decision affirming the judgment, in which to exercise an option to rescind the contract.[20] If Mc-

13. 694 F.2d 1240 (10th Cir. 1982).

14. *Id.* at 1241. "Gannett" refers collectively to Gannett Co. and the two newspapers unless otherwise noted.

15. *Id.* at 1241-42.

16. *Id.* at 1242. McKinney originally alleged eleven causes of action and sought rescission, an accounting, and damages. Gannett Co. asserted eight affirmative defenses; in a separate answer the New Mexican newspapers asserted twenty-six affirmative defenses. *Id.*

17. *Id.* at 1243.

18. *Id.*

19. *Id.* Because the New Mexico newspapers were not fully assimilated into Gannett, an accounting was proper and, additionally, was necessary to separate the newspapers' books and profits from Gannett operations.

As noted, the purpose of the option judgment was to ensure that Gannett Co. continued responsible operation of the newspapers. *Id.* at 1244. At this point in the proceedings, the defense attorney questioned whether the option to rescind would be a final judgment from which an appeal could be taken. *Id.* at 1245. The district court believed that an option judgment would be final. *Id.*

20. The option portion of the judgment was worded as follows:

McKinney may exercise the rescission election only during either of the following periods:

(1) The 60-day period commencing the day following expiration of the time to

Kinney failed to exercise this option, the contract would remain in full force and effect.[21] The parties then appealed to the Tenth Circuit.

2. The Decision

As noted, the Tenth Circuit considered the finality issue on its own motion.[22] The majority held that the district court judgment was not final, and dismissed the appeal for lack of appellate jurisdiction.[23] Judge Logan dissented from this disposition.[24]

McKinney argued that the judgment was final by virtue of the Tenth Circuit's reasoning in *Irwin v. West End Development Co.*[25] In *Irwin*, a constructive trust was imposed over stock to allow the plaintiffs thirty days to exercise their rights, as shareholders, to purchase a pro-rata share of the stock.[26] The defendant agrued that the plaintiffs' purchase rights had expired because they failed to exercise those rights within thirty days after the trial court's entry of judgment.[27] The Tenth Circuit held that the appeal suspended the thirty-day period until the judgment became effective, and that plaintiffs therefore retained their purchase rights.[28] The issue of final judgment was not considered.

McKinney argued that there was no meaningful difference between the stock purchase arrangement in *Irwin* and the rescission option created in his case. Both arrangements merely created the right to elect a fixed remedy following appellate consideration of the trial court's rulings.[29]

The *McKinney* judgment obviously contains an option. The Tenth Circuit, through Judge Barrett, viewed the judgment as terminating only the liability question, leaving the award of damages unresolved.[30] This form of judgment, leaving damages unresolved, is not final under section 1291.[31] To

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appeal, . . . provided that none of the parties to the action has filed a timely notice of appeal; or

(2) The 60-day period commencing on the date of issuance of a mandate of the United States Court of Appeals for the Tenth Circuit affirming McKinney's right to the rescission election.

*Id.* at 1245 (quoting district court judgment).

21. *Id.*

22. *See supra* note 2.

23. 694 F.2d at 1249.

24. *Id.* (Logan, J., dissenting).

25. 481 F.2d 34 (10th Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974).

26. 481 F.2d at 37, 40.

27. *Id.* at 39.

28. *Id.* at 40. The Tenth Circuit held that the option fell within the general rule that an appeal suspends the time required for performance of an obligation. *Id.* at 39-40.

29. 694 F.2d at 1247. The *Irwin* judgment provided "[such] tender shall be made within thirty days from the date this judgment becomes final, and, if such tender is not made, the trust hereby impressed shall be released." *Id.* at 1250 (Logan, J., dissenting).

30. 694 F.2d at 1246.

31. *Id.* The Supreme Court has held:

The order, viewed apart from its discussion of Rule 54(b), constitutes a grant of partial summary judgment limited to the issue of petitioner's liability. Such judgments are by their terms interlocutory, see Fed. Rule Civ. Proc. 56(c), and where assessment of damages or awarding of other relief remains to be resolved have never been considered to be "final" within the meaning of 28 U.S.C. § 1291.

Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 744 (1976), *quoted in McKinney*, 694 F.2d at 1246.

have the appellate court consider the case before a decision on damages disturbs the appropriate relationship by placing the appellate court in the trial process.

Besides relying on the form of the judgment in reaching its conclusion on lack of finality, the Tenth Circuit also drew upon the final judgment definition articulated in *Catlin v. United States*.[32] In *Catlin*, the Supreme Court held that a final judgment is one that "end[s] the litigation on the merits and leave[s] nothing for the court to do but execute the judgment."[33] The option judgment in *McKinney* required more than the mere execution of judgment, because execution of the district court judgment was dependent on McKinney's decision to rescind. Therefore, under *Catlin*, the trial court's order was not a final decision.[34]

A further factor militating against finding a final decision was the possibility of rendering an advisory opinion. Even though the parties' rights and liabilities had been adjudicated, to have the Tenth Circuit consider the merits would place the court in the position of rendering an advisory opinion.[35] The advisory opinion was possible because the majority interpreted the trial court's judgment as a "*second* . . . option to rescind, *following our opinion* on the merits."[36] Essentially, McKinney's decision would be based on the appellate treatment of alleged errors in the accounting, rather than the trial court's findings in the accounting proceeding.[37]

The majority opinion dismissed McKinney's analogy to *Irwin v. West End Development Co.*[38] by distinguishing *Irwin*. According to the majority, the *Irwin* judgment *required* plaintiffs to tender money for stock.[39] Therefore, it contained no option similar to that present in *McKinney*.[40]

Judge Breitenstein concurred in Judge Barrett's majority opinion, but distinguished *Irwin* on different grounds. *Irwin* involved equitable relief essentially forcing performance of a contractually created stock purchase option.[41] *McKinney* involved a judicially created option which would allow the plaintiff to choose one of two forms of relief after an appellate decision had settled certain issues affecting the relative worth of each option.[42] Essentially, the *McKinney* option allowed the plaintiff to obtain judicial advice on the effect of a particular election, thereby allowing an improper exercise of

32. 324 U.S. 229 (1945).

33. *Id.* at 233, *quoted in McKinney*, 694 F.2d at 1247.

34. 694 F.2d at 1248. *Cf.* Equal Employment Opportunity Comm'n v. Frontier Airlines, Inc., No. 82-1404 (10th Cir., Dec. 8, 1982) (district court approval of settlement agreement not final inasmuch as a defendant could opt out of the agreement).

35. It is axiomatic that federal courts cannot render advisory opinions. *E.g.*, Norvell v. Sangre de Cristo Dev. Co., 519 F.2d 370 (10th Cir. 1975).

36. 694 F.2d at 1249 (emphasis in original).

37. *Id.* The merits of the appeal involved tax questions and challenges to the accuracy of accounting; deciding those issues would have helped McKinney choose the most advantageous option. *Id.*

38. 481 F.2d 34 (10th Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974).

39. *Id.* The majority's characterization of the *Irwin* judgment order appears inaccurate. *See supra* note 29.

40. 694 F.2d at 1247.

41. *Id.* at 1249 (Breitenstein, J., concurring). *See Irwin*, 481 F.2d at 37-41.

42. 694 F.2d at 1249.

judicial power.[43]

3. The Dissent

Pointing first to the equitable motivation for the option,[44] and second to the fact that McKinney had no remedial option—he could either accept rescission or forego all relief whatsoever[45]—the dissent found the relief granted was an appropriate exercise of the trial court's equitable power.[46] The dissent also found support for its position in *Irwin*'s failure to consider the finality of the shareholders' option, which, for Judge Logan, was essentially identical to McKinney's option.[47] This failure indicated the routine nature of judgments granting optional relief.[48]

Judge Logan also rejected the majority's reliance on *Catlin*. The only action required of the trial court was entry of McKinney's election, and modifications in the accounting ordered by the court of appeals. Thus, the judgment was final under *Catlin*.

Next, the dissent pointed to the general rule that a judgment should be given a practical rather than a technical construction when considering finality.[49] The Tenth Circuit could have entertained the appeal to advance final judgment policies: trial proceedings would not be interfered with because the trial was over for all practical purposes; costs and piecemeal appeals would be avoided because remanding would allow interlocutory appeals pursuant to the certification provision in section 1292; and judicial efficiency would be promoted.[50] Also, because the legal issues had been decided by the lower court and the option was designed to encourage responsible action by Gannett, a remand would impose undue and unjustified hardship on the parties.[51] Judge Logan concluded by stating that he could not "accept the view that because litigants may abandon rights reduced to judgment the judgment is advisory"; accordingly, he would have addressed the appeal on the merits.[52]

C. *Judicial Discretion and Final Decisions*

The only Supreme Court construction of the meaning of "final decision" was in *Catlin*, where the Court held that the primary indicium of final-

43. *Id.*

44. *Id.* at 1250 (Logan, J., dissenting).

45. *Id. See supra* notes 20-21 and accompanying text.

46. 694 F.2d at 1250 (Logan, J., dissenting).

47. Judge Logan observed that the *Irwin* judgment did not *require* any action by the plaintiffs, notwithstanding the majority's interpretation of the terms of the judgment. *Id.* (quoting *Irwin* judgment).

48. *Id.*

49. *E.g.*, Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545 (1949). The dissent claimed the majority's opinion was merely a technical decision because, practically, the case was ripe for appeal. All the legal issues had been developed and decided. The contingency judgment was merely an equitable device that should not defeat the appeal. 694 F.2d at 1251 (Logan, J., dissenting).

50. 694 F.2d at 1251 (Logan, J., dissenting). *See generally* André, *The Final Judgment Rule and Party Appeals of Civil Contempt Orders: Time for a Change*, 55 N.Y.U. L. REV. 1041, 1061 (1980).

51. 694 F.2d at 1252 (Logan, J., dissenting).

52. *Id.*

ity was termination of a trial court's adjudicative function.[53] The Supreme Court has since acknowledged that this definition has not provided a formula through which a final judgment can be pinpointed.[54] Thus, as predicted in an early critique of the final judgment rule,[55] a large volume of litigation has evolved around the question of what constitutes a final decision.

In light of the inadequate *Catlin* definition, courts often invoke a balancing test. Although the ultimate purpose of the final decision rule is to have one review over all stages of the proceeding,[56] courts must balance avoidance of piecemeal review against delay which will cause a denial of justice.[57] Thus, fairness to litigants is not sacrificed merely because the presence of a final judgment is arguable. This balancing approach, however, still fails to create a clear formula for determining what constitutes a final judgment.

In *Gillespie v. United States Steel Corp.*,[58] Justice Black recognized that a decision on whether a judgment is final can often be supported equally either way.[59] The decision in *McKinney* illustrates Justice Black's assertion, and also demonstrates the significant discretionary power of an appellate court to determine finality.

The majority in *McKinney* strictly followed the *Catlin* definition. The trial court could not simply execute judgment because it was required to wait for McKinney's decision on the option. Because that decision would occur after the appeal, the majority refused to treat the trial court's order as a final decision; to do so would involve the appellate court in the trial process. Further, McKinney would have benefitted from an appellate decision on the merits of the appeal.[60] Thus, on balance, the competing policy factors weighed against assuming jurisdiction.[61] The dissent focused on the negative effects of refusing jurisdiction to a decision which had eliminated all the trial court's adjudicatory functions.[62] By remanding the case, the parties would incur considerable hardship, and interlocutory appeal possibilities would contribute to judicial inefficiency.[63] Therefore, the competing policy concerns weighed in favor of accepting jurisdiction. In essence, the judges,

53. *Catlin*, 324 U.S. at 233 ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.")

54. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).

55. Crick, *supra* note 5, at 558.

56. *Cohen*, 337 U.S. at 546.

57. *See, e.g.*, Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950). *See generally* André, *supra* note 50, at 1042. Judge Logan considered this balancing approach in *McKinney*. *See* 694 F.2d at 1251 (Logan, J., dissenting).

58. 379 U.S. 148 (1964).

59. Justice Black stated: "[w]hether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments. . . ." *Id.* at 152.

60. 694 F.2d at 1249.

61. Although the majority's analysis does not explicitly weigh competing policy concerns, this conclusion is implicit in its rejection of a decision which was final for all practical purposes. *See supra* notes 44-52 and accompanying text.

62. *See supra* text accompanying notes 50-51.

63. 694 F.2d at 1250 (Logan, J., dissenting).

in keeping with the practice of other circuit courts,[64] were using their discretion in determining whether the trial court's order was a final decision.

Fifty years ago one commentator concluded that without a definite formula for identifying a final judgment, section 1291 was useless.[65] A satisfactory definition must establish a definite point in a trial court proceeding which can be labeled as final; only when that point is reached could an appeal be taken.[66] As the Supreme Court has recognized, the *Catlin* definition is not dispositive. Instead of perfecting the definition, appellate courts continue to emphasize various purposes and policies in determining what is a final judgment.[67] Unfortunately, all the Tenth Circuit determined in *McKinney* was that a certain form of judgment is not a final decision under section 1291. The holding does nothing to clear the fog emanating from the *Catlin* definition.

Section 1291 is important because it avoids disruption and delay of legitimate court functions and minimizes the strain on the parties and the judicial system forseeable in a system sending all trial court orders through the appeal process.[68] As *McKinney* illustrates, however, in many cases courts are using their discretion in determining what constitutes a final decision under section 1291. Although the purposes behind section 1291 are important and must be effected, as it stands section 1291 generates as much labor as it saves.[69] Instead of requiring courts to rationalize their decisions, section 1291 should be repealed.[70] Appellate courts would then be left in their present position of applying discretion based on court-made policies, but would be able to develop a more disciplined set of criteria for determining finality.

The proposed repeal of section 1291 should not be equated with ignoring the judicial policy of avoiding piecemeal reviews, however. That policy, along with the policies of preventing excessive appeals, maintaining an appropriate relationship with the trial court, and avoiding undue hardship, must continue to serve as the guidelines for determining the scope of appellate jurisdiction.

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64. *See, e.g.*, *In re* Continental Inv. Corp., 637 F.2d 1 (1st Cir. 1980); *In re* Berkley & Co., 629 F.2d 548 (8th Cir. 1980); Dilly v. S.S. Kresge Co., 606 F.2d 62 (4th Cir. 1979); Ryan v. Occidental Petroleum Corp., 577 F.2d 298 (5th Cir. 1978); David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977); West v. Capitol Fed. Sav. & Loan Ass'n, 558 F.2d 977 (10th Cir. 1977); Kappelmann v. Delta Air Lines, Inc., 539 F.2d 165 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977).

65. Crick, *supra* note 5, at 563-65.

66. *See id.* at 558.

67. *Cf.* Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555, 575 (1963) (Harlan, J., dissenting) ("The Court's decision in these appeals throws the law of finality into a state of great uncertainty and will, I am afraid, tend to increase further efforts at piecemeal review.").

68. *See* André, *supra* note 50, at 1061.

69. *See* Crick, *supra* note 5, at 562.

70. *Cf.* Crick, *supra* note 5, at 564-65 (proposing repeal of statutory limits on appellate jurisdiction in favor of appellate discretion in order to effect a more meaningful appellate review).

## II. *HARRIS V. ILLINOIS-CALIFORNIA EXPRESS, INC.*: APPLYING THE REQUIREMENT OF COMPLETE DIVERSITY

### A. *Overview of Diversity Jurisdiction*

It is fundamental that federal courts are courts of limited jurisdiction.[71] Federal jurisdiction is limited both by the provisions of article III[72] and by the acts of Congress.[73] One such limitation is the diversity requirement, which permits actions normally within state court jurisdiction to be brought in federal court when the adverse parties are citizens of different states.[74] Supreme Court interpretations of the current diversity jurisdiction statute have held that if any adverse parties are citizens of the same state, diversity jurisdiction does not exist.[75] Historically, an exception to this statutory requirement of complete diversity has been recognized where complete diversity is lost through events taking place after a federal court properly had jurisdiction. In that circumstance, the Court has recognized the continued presence of diversity jurisdiction.[76] *Harris v. Illinois-California Express, Inc.*[77] required the Tenth Circuit to consider whether diversity jurisdiction existed following a series of procedural events, detailed below, which resulted in a loss of complete diversity.

### B. Harris v. Illinois-California Express, Inc.

#### 1. The Facts

*Harris* was a personal injury action arising from an automobile accident which took place in New Mexico. Kimberly Harris, a passenger in the car of Sherry and William Harden, commenced an action against the drivers, owners, and insurers of the other vehicles involved in the accident.[78] The action was filed in the federal district court for New Mexico, with jurisdiction based on complete diversity between Harris and the defendants.[79] The defendants

71. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *Accord* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 372 (1978).

72. U.S. CONST., art. III.

73. Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

74. 28 U.S.C. § 1332(a)(1) (1982) provides: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different states." *See also* U.S. CONST., art. III, § 2, cl. 7. The primary purpose of diversity jurisdiction is to protect out-of-state citizens from the prejudice of local courts, or at least to alleviate the fear of such prejudice. *See* Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809). Other justifications for diversity range from the supposed procedural advantages existing in federal court to the invigorating effect an available federal forum has on inter-regional capital flows. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS 134-36 (1983).

75. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530-31 (1967). *Accord* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 & n.13 (1978); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

76. *See* Wichita R.R. & Light Co. v. Public Util. Comm'n, 260 U.S. 48 (1922); *see generally* D. CURRIE, FEDERAL COURTS 303 (1982).

77. 687 F.2d 1361 (10th Cir. 1982).

78. *Id.* at 1364. Harris sued individually and as a personal representative of her husband's estate. Her husband was a passenger and died in the accident.

79. *Id.*

subsequently filed a third-party complaint against William Harden.[80] Following this complaint, Sherry Harden filed a motion requesting permission to intervene as a co-party plaintiff against the defendants named in Harris' original complaint, which motion was granted.[81] Sherry's intervention did not affect jurisdiction; complete diversity remained between all plaintiffs and defendants in Harris' original suit.[82] Next, however, Harris amended her complaint to include William Harden as a defendant.[83] Sherry Harden did not assert any claims against William.[84] Nonetheless, because both Hardens had identical state citizenship, William's addition as a defendant destroyed complete diversity; citizens of the same state were then on opposite sides of the same action.[85] After trial on the merits the defendants appealed, raising the question of diversity jurisdiction.[86]

2. The Decision

The Tenth Circuit began by observing that complete diversity existed at the time of Harris' original complaint, remained after Sherry Harden intervened as a plaintiff, and was only lost when William Harden was joined as a defendant by Harris' amended complaint.[87] The Tenth Circuit held, however, that Harris's addition of William did not violate the complete diversity rule.[88] This holding stemmed from the court's statement that once diversity jurisdiction has properly attached, jurisdiction is not destroyed by the permissive intervention of a non-indispensable party, especially where that party has independent grounds for jurisdiction.[89] The court rejected defendants' argument that Sherry Harden was an indispensable party. Although the claims of Harris and Sherry Harden had questions of law and fact in common, the actions were independent of each other and could be treated separately.[90] Because Sherry was not an essential party, her intervention could not defeat diversity jurisdiction.[91]

The Tenth Circuit then considered William Harden's position in the

80. *Id.* William Harden filed cross-claims against the defendants as third-party plaintiffs. *Id.*

81. *Id.* at 1364-65.

82. *Id.* at 1365.

83. *Id.* Harris and William Harden had different state citizenships.

84. *Id.*

85. *Id.* At the district court level the defendants moved to dismiss for lack of diversity jurisdiction, but withdrew the motion. *Id.*

86. *Id.* Plaintiffs prevailed at trial. *Id.* at 1364.

87. *Id.* at 1366.

88. *Id.* at 1369.

89. *Id.* at 1367. This principle is grounded in the doctrine of ancillary jurisdiction, which permits a court to exercise judicial power over a group of related claims once jurisdiction exists over the original claim. *See* D. CURRIE, *supra* note 76, at 303. Limits on ancillary jurisdiction exist, *see* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978), although those limits have yet to be defined. *See* D. CURRIE, *supra* note 76, at 304. *See also* infra notes 99-143 and accompanying text.

90. 687 F.2d at 1368. The court also noted that Sherry's intervention did not, in itself, destroy diversity jurisdiction. The Tenth Circuit analogized this situation to a consolidation of actions under FED. R. CIV. P. 42. If the two actions had been commenced independently, they would have been consolidated for judicial economy. Therefore, jurisdiction should be maintained. *See* 687 F.2d at 1368-69.

91. *Id.* (quoting *Wichita R.R. & Light Co. v. Public Util. Comm'n*, 260 U.S. 51, 53-54 (1922)).

action. Although Harris' amended complaint joining William Harden as a defendant destroyed complete diversity, like Sherry, William was not an essential party.[92] Therefore, William's addition, like Sherry's, could not divest the court of jurisdiction.[93]

The conclusion to recognize jurisdiction was buttressed by citation to the Supreme Court's decision in *Owen Equipment & Erection Co. v. Kroger*.[94] *Owen* rejected the argument that diversity jurisdiction remained after all diverse defendants had been dismissed from plaintiff's case, even though diversity jurisdiction had originally been present.[95] Crucial to the decision, however, was the fact that the plaintiff in *Owen* could not have sued the remaining defendant under the diversity provisions.[96] The Supreme Court recognized that the doctrine of ancillary jurisdiction, although flexible, could not be used to create jurisdiction over a suit so obviously in contravention of the statutory diversity requirement.[97] The Tenth Circuit, emphasizing *Owen*'s recognition of the benefits of flexibility in construing a court's ancillary jurisdiction powers,[98] upheld jurisdiction in *Harris* notwithstanding the lack of complete diversity.

### C. *The Tenth Circuit Loses Itself in Court-Made Rules*

Diversity jurisdiction is determined at the time an action is commenced and at every stage of the proceeding.[99] This jurisdiction cannot be enlarged or limited by the Federal Rules of Civil Procedure.[100] Pursuant to Rule 14(a),[101] the defendants named in Harris' original complaint impleaded William Harden as a third-party defendant.[102] By so doing, the district court acquired jurisdiction over Mr. Harden. Because impleader is a defensive weapon, which ensures that a defendant's interests are adequately pro-

92. 687 F.2d at 1368-69.
93. *See id.* at 1368-69.
94. 437 U.S. 365 (1978).
95. *Id.* at 377.
96. *See id.*
97. *Id.*
98. 687 F.2d at 1369.
99. *See, e.g.*, Treines v. Sunshine Mining Co., 308 U.S. 66 (1939). In certain circumstances, once diversity jurisdiction is held to exist subsequent changes in the status of the original parties will not divest a court's jurisdiction. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938) (diversity jurisdiction not ousted by plaintiff's subsequent lowering of claimed damages); Koenigsberger v. Richmond Silver Mining Co., 158 U.S. 41 (1895) (subsequent change in a party's citizenship will not destroy diversity jurisdiction). *Cf. also* Hill v. Rolleri, 615 F.2d 886 (9th Cir. 1980) (court maintained jurisdiction over non-diverse third-party claim after dismissal of diverse plaintiff because diversity was present at time action commenced, and subsequent events would not defeat jurisdiction).
100. FED. R. CIV. P. 82 provides in part that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts."
101. FED. R. CIV. P. 14(a). This rule provides in part:

> At any time after commencement of the action a defending party as a third-party plaintiff may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him . . . . The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff . . . .

*Id.*
102. 687 F.2d at 1364.

tected, no independent jurisdictional grounds need to be asserted by the impleading defendant.[103] Jurisdiction over an impleaded defendant exists by virtue of a federal court's power to hear claims ancillary to the primary action.[104]

Rule 14(a) also permits the original plaintiff to assert claims directly against a third-party defendant.[105] Because Rule 14(a) is not jurisdictional,[106] confusion has arisen as to when independent grounds for jurisdiction are necessary for a plaintiff asserting claims directly against a third-party defendant. This section will attempt to sort out some of that confusion.

In 1978, the Supreme Court concluded that independent jurisdictional grounds must be present for a diversity plaintiff to assert a claim directly against a third-party defendant.[107] The Supreme Court's decision, *Owen Equipment & Erection Co. v. Kroger*,[108] involved diversity action in which the plaintiff amended her complaint to assert a claim against a non-diverse third-party defendant.[109] The primary diverse defendant was dismissed from the action,[110] and the Supreme Court held that jurisdiction was lost over the remaining claim in the absence of an independent basis for federal jurisdiction.[111] Although Kroger reemphasizes strict construction of the diversity requirement,[112] its actual holding is limited to the factual situation in which the plaintiff and the third-party defendant are non-diverse.[113]

The lower courts in *Kroger* would have retained the action under the doctrine of ancillary jurisdiction.[114] Discussing the scope of ancillary jurisdiction[115] in light of the federal diversity requirements, the Court observed

103. Northern Contracting Co. v. C.J. Langenfelder & Son, Inc., 439 F. Supp. 621, 624 (E.D. Pa. 1977); *see also* James Talcott, Inc. v. Allahabad Bank Ltd., 444 F.2d 451 (5th Cir. 1971); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

104. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 375 n.18 (1978).

105. *See supra* note 101.

106. *See supra* note 100.

107. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978).

108. 437 U.S. 365 (1978).

109. *See id.* at 368-69.

110. *Id* at 368.

111. *Id*. at 370, 377.

112. *See id.* at 377. The rule of complete diversity reaffirmed in *Kroger* requires every plaintiff in a diversity action to have a state citizenship different from every defendant. *Harris*, 687 F.2d at 1366 (quoting *Kroger*, 437 U.S. at 377). *See also* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806); Oppenheim v. Sterling, 368 F.2d 516 (10th Cir.), *cert. denied*, 386 U.S. 1011 (1966).

113. *See infra* notes 114-18 and accompanying text. The Fifth Circuit has held that *Kroger* holds that "an independent basis of jurisdiction is necessary for a plaintiff in a diversity action to assert a non-federal claim against a non-diverse third-party defendant." Birmingham Fire Ins. Co. v. Winegardner & Hammons, Inc., 714 F.2d 548, 553-54 (5th Cir. 1983) (quoting Fauvor v. Texaco, Inc., 546 F.2d 636, 643 (5th Cir. 1977)).

114. 437 U.S. at 367. The court of appeals held that the district court had discretion over whether it should adjudicate the non-diverse claim because, under United Mine Workers v. Gibbs, 383 U.S. 715 (1976), the plaintiff's claim against the third-party defendant derived from the same "core of operative facts" as the main action. 437 U.S. at 369.

115. The distinctions in applying pendant and ancillary jurisdictions are fading into one indistinguishable doctrine. *See generally* Comment, *Pendant and Ancillary Jurisdiction: Towards a Synthesis of Two Doctrines*, 22 U.C.L.A. L. REV. 1263, 1273 (1975). In *Kroger*, the Supreme Court, without attempting to distinguish between ancillary and pendant jurisdiction, 437 U.S. at 370

that if the plaintiff was allowed to assert her claim against the non-diverse third party, the diversity requirement would be circumvented.[116] To prevent such an occurrence, the Supreme Court set forth three criteria for ancillary jurisdiction. Besides the requirement of a "common nucleus of operative fact" enunciated in *United Mine Workers v. Gibbs*,[117] the Court added that consideration should be given to the context in which the non-federal claim is propounded, and that consideration should be given to maintaining the integrity of the statute bestowing jurisdiction over the original claim.[118] Noting that ancillary jurisdiction normally is a defensive weapon used by defendants,[119] and applying the three criteria to the facts in *Kroger*, the Supreme Court prohibited the offensive use of ancillary jurisdiction by the plaintiff in a diversity action.

The Tenth Circuit did not discuss the initial propriety of Harris' amended complaint including William Harden as a defendant. Instead, the court was concerned solely with whether Mr. Harden was an indispensable party.[120] Although Judge Barrett failed to discuss Harris's amendment under the three criteria set out in *Kroger*, the complaint satisfies those criteria and, therefore, is not in conflict with *Kroger*'s prohibition against the offensive use of ancillary jurisdiction. First, Harris' direct claim against William Harden as third-party defendant obviously arose from the same core of operative fact,[121] and is a claim which Harris would expect to try with her other claims in one judicial proceeding.[122] Second, the posture in which Harris' amended complaint comes about is important on two points. To begin with, unlike the defendant in *Aldinger v. Howard*[123] Mr. Harden was already a party to the action and within the court's jurisdiction. Harris' amended complaint therefore does not raise the problems associated with a plaintiff's

n.8, recognized that ancillary jurisdiction is clearly proper with respect to impleader, cross-claims, and counter-claims. *Id.* at 375 & n.18.

116. "[A] plaintiff could defeat the statutory requirement of complete diversity by the simple expedient of suing only those defendants who were of diverse citizenship and waiting for them to implead nondiverse defendants." 437 U.S. at 374.

117. 383 U.S. 715, 725 (1966).

118. *Id.* at 373 (citing Aldinger v. Howard, 427 U.S. 1, 18 (1976)). The three factors articulated in *Kroger* have been applied in subsequent ancillary jurisdiction cases. *E.g.*, Travelers Ins. Co. v. First Nat'l Bank, 675 F.2d 633, 638-40 (5th Cir. 1982) (held no ancillary jurisdiction over cross-claims of non-diverse parties in an interpleader action); Acton Co. v. Bachman Foods, Inc., 668 F.2d 76, 79-80 (1st Cir. 1982) (held no ancillary jurisdiction over joinder of non-diverse plaintiff); Gunnell v. Amoco Oil Co., 490 F. Supp. 67, 69 (W.D. Mich. 1980) (held no ancillary jurisdiction over plaintiff's claim against a non-diverse third-party defendant). *See also* Runyan v. United Bhd. of Carpenters, 566 F. Supp. 600 (D. Colo. 1983) (applied *Kroger's* requirements to prohibit pendant jurisdiction over a state claim).

119. 437 U.S. at 376. Ancillary jurisdiction is "defensive" because it is a way for defendants, brought into court against their will, to protect their interests by asserting claims against the plaintiff or other responsible parties. *Id.*; *see also* Acton Co. v. Bachman Foods, Inc., 668 F.2d 76, 79 (1st Cir. 1982); Comment, *supra* note 115, at 1273. Justice White dissented from *Kroger*'s defensive classification of ancillary jurisdiction. *Kroger*, 437 U.S. at 381 (White, J., dissenting). Justice White would have followed *Gibbs*, and held that a common nucleus of operative fact is sufficient for jurisdiction over all claims arising in a diversity case. *Id.* at 384.

120. 687 F.2d at 1368-69. The Tenth Circuit ultimately held that Mr. Harden was not a necessary party to Kimberly Harris' action.

121. *See id.* at 1364-65.

122. *See Gibbs*, 383 U.S. at 725.

123. 472 U.S. 1 (1976). The Supreme Court in *Aldinger* held that a federal court does not have pendant party jurisdiction over a defendant sued solely on a state claim.

attempt to add a new party to the action.[124] Next, unlike *Kroger*, Harris and William Harden were diverse parties, so that Harris could have maintained an independent action against Mr. Harden in federal court.[125] Finally, the independent jurisdictional basis upon which Harris could amend her complaint to include a claim against William Harden ensures the integrity of the diversity jurisdiction statute. Harris' use of Rule 14(a) did not expand the Tenth Circuit's limited jurisdiction; hence, her action against Harden is permissible under *Kroger*.

Sherry Harden's effect on diversity, as a result of Sherry's intervention, is not necessarily determinative for purposes of diversity jurisdiction. When a party seeks to intervene in a lawsuit, several considerations are implicated. First, it must be determined whether the party seeking intervention is an indispensable party under Rule 19.[126] The Tenth Circuit correctly held that Sherry was not an indispensable party.[127] After determining that an intervenor such as Sherry is not an indispensable party, the propriety of permissive intervention must be considered. Two requirements must be met for permissive intervention under Rule 24(b).[128] First, the intervenor must have a question of law or fact in common with the pending action.[129] Second, the intervening party must have independent grounds for federal jurisdiction.[130] Sherry Harden met both requirements.[131] When a party is not indispensable and meets the criteria for permissive intervention, diversity jurisdiction under 18 U.S.C. § 1332(a)[132] is not destroyed.[133] Therefore, Sherry's presence as a permissive intervenor did not have to be considered when Harris' complaint was amended to include William Harden as a defendant.

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124. *See id.* at 14-15. *Aldinger* distinguished between the situation where a plaintiff seeks to assert a claim against one already present under federal jurisdiction and a plaintiff's attempt to join an entirely new defendant without an independent basis of jurisdiction. In the latter situation, the federal court would lack jurisdiction. *Id. See Kroger*, 437 U.S. at 381-82 (White, J., dissenting) (noting this significant distinction involving context). Moreover, the *Aldinger* holding was limited to the plaintiff's specific claim pursuant to 18 U.S.C. § 1343(3) (1982) and 42 U.S.C. § 1983 (Supp. V 1981). The Court recognized that different party alignments and different jurisdictional statutes could permit a different result. 427 U.S. at 18.

125. *See* 28 U.S.C. § 1332 (1982) (providing a federal jurisdiction for diversity actions). This aspect of the case negates the Supreme Court's fear in *Kroger* that a plaintiff could sue only diverse citizenship defendants and wait for the defendants to implead non-diverse defendants. *See supra* note 116.

126. FED. R. CIV. P. 19. This rule sets out the requirements for classification as an indispensable party.

127. *See* 689 F.2d at 1367.

128. FED. R. CIV. P. 24(b).

129. "[A]nyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common." *Id.*

130. 687 F.2d at 1367; Miller & Miller Auctioneers, Inc. v. G.W. Murphy Indus., Inc., 472 F.2d 893, 528, 530 (10th Cir. 1973) (permissive intervention denied because no independent grounds for jurisdiction). When the intervening party does not have independent jurisdictional grounds, the intervenor must meet Rule 24's requirements for intervention by right.

131. Sherry had questions of law and fact in common with Harris, and diversity jurisdiction was present between Sherry and the original defendants. 687 F.2d at 1367.

132. 18 U.S.C. § 1332(a) (1982).

133. Miller v. Miller, 406 F.2d 590, 593 (10th Cir. 1969) ("Executors are not indispensable parties in actions such as this and therefore the intervention of such a party cannot destroy diversity jurisdiction."); Drillers Engine & Supply, Inc. v. Burckhalter, 327 F. Supp. 648, 649-50 (W.D. Okla. 1971) (non-indispensable parties do not defeat the court's diversity jurisdiction over the main action).

The above reasoning appears to have been followed by the Tenth Circuit,[134] but parts of Judge Barrett's analysis fail to articulate the interaction between Rule 19(a), Rule 24(b), and section 1332(a). At the outset, the Tenth Circuit's emphasis on the fact that Sherry intervened prior to Harris' amended complaint[135] is misplaced. Regardless of when permissive intervention is sought, it is within the court's discretion to allow intervention if the party is not indispensable and the criteria behind Rule 24(b) are met.[136] Because diversity jurisdiction over the main action is not affected by such a party, it does not matter when the party seeks to intervene.[137]

Another aspect of *Harris* indicating the court's failure to focus on the relevant rules is its quote from *Wichita Railroad & Light Co. v. Public Utilities Commission*.[138] *Wichita Railroad* involved the permissive intervention of a non-diverse party as a defendant.[139] In that case, the Supreme Court held jurisdiction was not divested.[140] The Tenth Circuit unfortunately did not distinguish *Wichita Railroad*, which did not involve Rule 24(b) and which does not support the Tenth Circuit's statement that Sherry Harden could not have intervened if Harris had amended her complaint first.[141] Finally, the discussion of consolation[142] seems to be a weak effort to bolster the Tenth Circuit's holding, and suggests that the court may have been uneasy with its own reasoning and with reliance on Rule 24(b).

Although the court's conclusion in *Harris* is correct under the criteria set out in *Kroger*, the Tenth Circuit's reasoning relies on undisciplined arguments and fails to note factual distinctions in relevant precedents. *Kroger* did

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134. *See* 687 F.2d at 1367-68.

135. *See id.* at 1368.

136. *See supra* notes 126-33 and accompanying text; *cf.* Drillers Engine & Supply, Inc. v. Burckhalter, 327 F. Supp. 648, 649 (W.D. Okla. 1971) (pointing out that non-diverse parties did not assert claims against each other but were asserting their own claims independently).

137. *See supra* note 132 and accompanying text. The Tenth Circuit implicitly recognized this point when it discussed whether William Harden was an indispensable party. *See* 687 F.2d at 1369.

138. 260 U.S. 48 (1922). *Harris* quoted the following passage from *Wichita Railroad*:

> The intervention of the Kansas Company, a citizen of the same State as the Wichita Company, its opponent, did not take away the ground of diverse citizenship. That ground existed when the suit was begun and the plaintiff set it forth in the bill as a matter entitling it to go into the District Court. Jurisdiction once acquired on that ground is not divested by a subsequent change in the citizenship of the parties . . . . Much less is such jurisdiction defeated by the intervention, by leave of the court, of a party whose presence is not essential to a decision of the controversy between the original parties . . . . The Kansas Company, while it had an interest and was a proper party, was not an indispensable party.

687 F.2d at 1368 (quoting *Witchita Railroad*, 260 U.S. at 53-54).

139. 260 U.S. at 52-53. This case illustrates the defensive use of ancillary jurisdiction, rather than the offensive use prohibited by the Supreme Court in *Kroger*. Such a factual difference surrounding the non-diversity claim is perhaps the material reason why *Kroger* did not overrule *Wichita Railroad*. In *Wichita Railroad* a defendant benefited, whereas in *Kroger* it would have been the plaintiff who benefited.

140. *Id.* at 54.

141. *See* 687 F.2d at 1368. Specificially, there were no independent jurisdictional grounds in *Wichita Railroad*. 260 U.S. at 52. In fact, the *Wichita Railroad* quote supports the conclusion that Sherry Harden could have intervened after William Harden had been joined as a direct defendant by Harris.

142. *See* 687 F.2d at 1368-69 (distinguishing *Kroger* from consolidation actions under FED. R. CIV. P. 42).

not eliminate the possibility of avoiding complete diversity. It is a significant decision in the diversity area and should not be tossed aside unnoticed, as the Tenth Circuit seemed to do in *Harris*. Reaching the proper result through the misapplication of *Kroger* and *Wichita Railroad* leaves *Harris* a bewildering and confusing precedent.[143]

## III. REMOVAL JURISDICTION

Removal refers to the right to transfer an action from a state court, where it was originally filed, to a federal court. Removal is permitted when the federal court would have had original jurisidiction over the action.[144] This right has existed as a valid statutory procedure since the Judiciary Act of 1789.[145] The purposes behind the removal statute are to escape local prejudice towards nonresident litigants and to provide an appropriate forum for actions involving federal law which have been brought in state court.[146] The construction and effect of the removal statute was the subject of several Tenth Circuit decisions this past term.

### A. *Defect in State Jurisdiction Not Cured by Removal*

Jurisdiction upon removal is derivative, meaning that when a state court has no jurisdiction over a claim, a federal court acquires none on removal and must dismiss the case.[147] This is true even if jurisdiction would have been proper had the suit originally been filed in a federal court.[148] The Tenth Circuit, in *Goodrich v. Burlington Northern Railroad*,[149] reinforced the rule that where a state court does not have jurisdiction over a particular claim, proper removal to a federal court will not cure the defect regardless of considerations of judicial economy.

*Goodrich* was a negligence action originally brought in a Colorado state court. The defendant, Burlington Northern Railroad (Burlington), impleaded the United States Postal Service (United States), asserting claims for

143. *Harris* is another example of the judicial energy wasted on the diversity requirement, and lends support for abolishing diversity jurisdiction. *See generally* Rowe, *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979).

144. *See* 28 U.S.C. § 1441(a) (1982). This section states:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

*Id.*

145. Judiciary Act of 1789, ch. 20, § 12; 1 Stat. 73, 79. For a brief history of the removal statutes, see Note, *Remand Order Review After* Thermtron Products, 1977 U. ILL. L. F. 1086, 1088-91.

146. Myers, *Federal Appellate Review of Remand Orders: Expansion or Eradication?* 48 MISS. L.J. 741, 741 (1977).

147. Arizona v. Manypenny, 451 U.S. 232, 242 & n.17 (1981). The dismissal is based on lack of subject matter jurisdiction. Venner v. Michigan Central R.R., 271 U.S. 127, 131 (1926); *accord* Washington v. American League of Professional Baseball Clubs, 460 F.2d 654 (9th Cir. 1972); Martinez v. Seaton, 285 F.2d 587 (10th Cir.), *cert. denied*, 366 U.S. 946 (1961). *See also* Montgomery v. Utah, No. 82-2194 (10th Cir., Feb. 28, 1983) (removal jurisdiction dependent upon a viable state action).

148. Arizona v. Manypenny, 451 U.S. 232, 242 n.17 (1981).

149. 701 F.2d 129 (10th Cir. 1983).

contribution and indemnity under the Federal Tort Claims Act.[150] The United States successfully removed the case to federal court.[151] Once in federal court, the United States pointed out that exclusive jurisdiction over claims asserted under the Federal Tort Claims Act rests with the federal district courts.[152] The state court therefore had no jurisdiction over the third party claim, with the result that the federal district court had no derivative jurisdiction.[153] The district court agreed, and dismissed the third-party claim for lack of subject matter jurisdiction.[154] The propriety of the dismissal was appealed to the Tenth Circuit.

On appeal, Burlington asserted that the federal district court erred in granting the dismissal because such a ruling, based on the derivative jurisdiction principle, frustrated judicial economy.[155] Judge Seymour, writing for the Tenth Circuit, considered the impleader rule[156] and its purpose of judicial economy, and stated that the derivative jurisdictional principle nonetheless applied to third-party claims.[157] Judge Seymour followed *Kenrose Manufacturing Co. v. Fred Whitaker Co.*,[158] a Fourth Circuit decision which held that mere permission in the federal rules to bring a claim does not confer jurisdiction over a claim.[159]

The application of *Kenrose Manufacturing* in *Goodrich* was entirely appropriate. The state court did not have jurisdiction over the third-party claim, and removal could not create jurisdiction over that claim. The Tenth Circuit properly ruled that a judicial economy argument supporting a third-party claim cannot cure a defect in subject-matter jurisdiction. Thus, the derivative jurisdiction principle applies to third-party claims as well as to main actions.

### B. *Limiting the Permissible Grounds for Remand to State Court*

After removal, a district court must remand a case back to state court at any time prior to final judgment if the case appears to have been "removed improvidently and without jurisdiction."[160] Until 1976, the general rule was no appellate review of district court remand orders.[161] The nonreviewability

150. 28 U.S.C. §§ 2671-2680 (1982). *See* 701 F.2d at 130.

151. 701 F.2d at 130.

152. *Id. See* 28 U.S.C. § 1346(b) (1982).

153. 701 F.2d at 130.

154. *Id.* Because the federal district court did not have jurisdiction over the primary claim of negligence, and did not acquire jurisdiction over the federal claim, the question of pendent jurisdiction over the primary claim was not considered.

155. *Id.* Dismissal of the third-party claims means Burlington must now bring its indemnity and contribution claim against the United States as a separate cause of action in federal court. *See* 28 U.S.C. § 1346(b) (1982).

156. FED. R. CIV. P. 14(a). Rule 14(a) allows a defendant to implead a third party who is or may be liable to the defendant for all or part of the original plaintiff's claim. *Id.*

157. 701 F.2d at 130.

158. 512 F.2d 890 (4th Cir. 1972).

159. *Id.* at 893. "Permission" means that although Rule 14(a), for example, does not require third party impleader, a court in its discretion *may* allow the impleader. There is nothing in Rule 14(a) conferring jurisdiction, and therefore it should not be construed as a source of jurisdiction. *See* FED. R. CIV. P. 82.

160. *See* 28 U.S.C. § 1447(c) (1982).

161. *See* Myers, *supra* note 146, at 743. This rule originates from 28 U.S.C. § 1447(d) (1982)

rule was intended to prevent delays and interruptions of the proceedings in a case.[162] Then, in *Thermtron Products, Inc., v. Hermansdorfer*,[163] the Supreme Court relaxed the harshness of this rule by holding that a remand order for a properly removed case may be reviewed when the remand is based on grounds not authorized by statute.[164] The Tenth Circuit applied this rule of law when it granted a writ of mandamus in *Sheet Metal Workers International Association v. Seay*.[165]

*Sheet Metal Workers* was commenced in Oklahoma state court, and involved an alleged breach of a collective bargaining agreement.[166] The case was properly removed to the United States District Court for the Eastern District of Oklahoma because federal district courts have original jurisdiction over actions involving collective bargaining agreements.[167] The federal district court then granted the employer's motion to remand the case to state court.[168] The case was not remanded upon statutory grounds, however.[169] Applying *Thermtron*, the Tenth Circuit granted the requested writ of mandamus and ordered the district court to vacate the remand order and hear the case.[170]

The Tenth Circuit's decision rejected the three arguments raised by the employer (Acme). First, Acme argued that the mandamus proceeding was barred because of the statutory prohibition against appellate review of remand orders.[171] Citing *Thermtron*, the Tenth Circuit responded that a remand decision is reviewable when it is based on grounds not specified by statute.[172] Because the statute, 28 U.S.C. § 1447(c),[173] permits remand only when removal is "improvident and without jurisdiction," and those were not the grounds proffered by the district court, appellate review was not barred.[174]

Second, Acme attempted to distinguish *Thermtron* by pointing out that the word "improvidently" is not defined. Therefore, respondent Acme con-

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which reads in relevant part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The statute provides an exception for remand orders in civil rights cases. *Id.*

162. Myers, *supra* note 146, at 742 (citing Chandler v. O'Bryan, 445 F.2d 1045, 1057 (10th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972)).

163. 423 U.S. 336 (1976).

164. *Id.* at 351. The statutory basis for remand is set forth in 28 U.S.C. § 1447(c) (1982).

165. 693 F.2d 1000 (10th Cir. 1982), *modified*, 696 F.2d 780 (10th Cir. 1983). The court modified its original decision to allow the district court to determine whether it would entertain pendent state claims. 696 F.2d at 783.

166. 693 F.2d at 1001.

167. *See* Labor-Management Relations (Taft-Hartley) Act § 301(a), 29 U.S.C. § 185(a) (1982). Removal of original jurisdiction actions is authorized by 28 U.S.C. § 1441(a) (1982).

168. 693 F.2d at 1001.

169. Concurrent jurisdiction existed between the state and federal court. The injunctive relief requested by the employer could not be granted by the federal court, *see* Norris-LaGuardia Act, 29 U.S.C. §§ 101-114 (1982), but was a possible remedy in state court. 693 F.2d at 1001. The district court remanded because it felt the state court's power to grant complete relief made that court a better forum. *Id.* at 1002 n.2.

170. 693 F.2d at 1006.

171. *Id.* at 1002. *See* 28 U.S.C. § 1447(d) (1982).

172. 693 F.2d at 1002.

173. 28 U.S.C. § 1447(c) (1982).

174. 693 F.2d at 1001-02.

tended, the definition of "improvidently" removed should include situations in which removal would limit the available remedies.[175] The Tenth Circuit disagreed, stating that the presence of restricted remedies in federal court does not compel a remand. Disparity in remedies is just one of the hardships incurred when federal jurisdiction is properly invoked.[176]

Third, Acme contended that the case had been "improvidently removed." For this argument to stand, however, Acme was required to show a procedural defect.[177] Because the case had been timely removed and contained no other procedural defects, it had not been "improvidently removed" and appellate review was proper.[178] Restricted remedies did not violate a procedural requirement, and consequently could not affect the circuit court's jurisdiction.[179]

After rejecting Acme's arguments the Tenth Circuit concluded that the restricted availability of remedies is not a statutory ground for remand back to a state court.[180] Consequently, the court was required to grant the requested mandamus.[181] The fact that the court felt compelled to grant the mandamus indicates that district courts are no longer free to remand for reasons not specified by statutes.

### C. *Limiting "Federal Question" Removal*

Another general rule in removal jurisdiction is that removal statutes are to be strictly construed.[182] The Tenth Circuit applied this rule in *Fajen v. Foundation Reserve Insurance Co.*,[183] where it considered whether the federal district court had jurisdiction pursuant to 28 U.S.C. § 1441(b),[184] which permits removal of cases involving federal questions.[185]

A brief recital of the complex procedural history behind *Fajen* is necessary for an understanding of the court's decision. Five years after the plain-

175. *Id.* at 1003. Acme was seeking injunctive relief which a federal court could not grant but a state court could. *See supra* note 169.

176. *See* 693 F.2d at 1004 (quoting Avco Corp. v. Aero Lodge No. 735, Int'l Assoc. of Machinists, 390 U.S. 557, 561 (1968)). The Tenth Circuit noted that the solution to the problem of restricted remedies lies with Congress. 693 F.2d at 1004.

177. 693 F.2d at 1005. *See generally* Note, *supra* note 145, at 1093 (concludes improvidently means legally defective). *But cf.* Young v. Board of Educ., 416 F. Supp. 1139, 1141 (D. Colo. 1976) (without mentioning section 1447(c), the district court remanded a properly removed case because either state or federal court could hear civil rights actions and the plaintiff's choice of forum should be protected).

178. *See* 693 F.2d at 1005 (failing to find procedural defect).

179. Avco Corp. v. Aero Lodge No. 735, Int'l Assoc. of Machinists, 390 U.S. 557, 561 (1968).

180. 693 F.2d at 1005-06.

181. *Id.* at 1006.

182. *See, e.g.*, Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941); Chicago, R.I. & P.R. Co. v. Stude, 204 F.2d 116 (8th Cir. 1953), *aff'd*, 346 U.S. 574 (1954).

183. 683 F.2d 331 (10th Cir. 1982).

184. 28 U.S.C. § 1441(b) (1982). This section reads:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought.

*Id.*

185. 683 F.2d at 333.

tiff had obtained a default judgment in a Nevada state court, the plaintiff filed suit in the United States District Court for the District of New Mexico to recover the unsatisfied judgment.[186] The district court refused to enforce the judgment; instead, it granted summary judgment for the defendant because the record in the earlier action indicated that the plaintiff had failed to comply with Nevada's requirements for substituted service of process.[187] Consequently, the Nevada court had not had personal jurisdiction over the defendant in the earlier action, and the default judgment was unenforceable.[188] The plaintiff then returned to Nevada and obtained an amended default judgment nunc pro tunc, which corrected the personal jurisdiction problem.[189] Plaintiff then instituted an action in a New Mexico state court seeking to enforce the amended Nevada judgment.[190] Defendant requested removal to federal district court, which the United States District Court for the District of New Mexico granted to protect its prior summary judgment decision.[191] Instead of treating plaintiff's suit on the nunc pro tunc judgment separately, however, the district court consolidated it with the prior grant of summary judgment for the defendant and characterized the consolidated action as a Rule 60(b)[192] motion to vacate the grant of summary judgment.[193] The hybrid motion was then denied, and the action was dismissed.[194]

On appeal the issue was whether jurisdiction existed to permit removal.[195] The majority held that removal was improper, and ordered the case remanded to state court.[196] The starting point for the majority's analysis was the rule that removal jurisdiction statutes must be strictly construed.[197] In *Fajen*, the majority found that the district court was more concerned with protecting its prior summary judgment than with applying the Tenth Circuit's standard for removal based on a federal question.[198] Two reasons were given for reversing the trial court's assumption of jurisdiction.

First, plaintiff's action on the judgment nunc pro tunc was not a collateral attack on the federal court's grant of summary judgment because the issues involved in the two actions were markedly different.[199] The issue in the summary judgment proceeding was limited to determining whether the

186. *Id.* at 332.
187. *Id.*
188. *See id.* at 333.
189. *Id.*
190. *Id.*
191. *Id.*
192. FED. R. CIV. P. 60(b). Rule 60(b) permits motions to vacate a prior judgment.
193. 683 F.2d at 333.
194. *Id.*
195. *Id.*
196. *Id.* at 334. Chief Judge Seth dissented from this decision. *Id.* (Seth, C.J., dissenting).
197. *Id.* at 333 (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941)).
198. 683 F.2d at 333. The standard to be met is that "the required federal right or immunity must be an essential element of the plaintiff's cause of action, and . . . that federal controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal." Madsen v. Prudential Fed. Sav. & Loan Ass'n, 635 F.2d 797, 800 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018 (1981), *quoted in Fajen*, 683 F.2d at 333.
199. 683 F.2d at 334.

Nevada state court had jurisdiction to enter the original default judgment.[200] The issue in the disputed proceeding on the judgment nunc pro tunc, however, was whether Nevada could cure the jurisdictional defect after the fact.[201] Consequently, the prior judgment was not at issue in the second suit, and the court had no jurisdiction to grant a removal petition to protect its previous judgment.[202]

Second, to the extent that the federal summary judgment order was implicated in the second proceeding, it was implicated only by way of defense.[203] The majority stated that the basis for federal question removal must appear on the face of a complaint.[204] Where the complaint was predicated on state grounds, the fact that the suit might ultimately involve construction of a prior federal judgment did not convert the suit into an action involving a federal question.[205] Hence, removal under section 1441(b) was improper.[206]

Chief Judge Seth, in dissent, presented the two issues on appeal as first, whether plaintiff's motion to remand the action to state court was properly denied, and second whether the Rule 60(b) motion was properly denied.[207] Chief Judge Seth declared strongly that the action on the nunc pro tunc judgment directly attacked the district court's grant of summary judgment because the nunc pro tunc proceeding was in essence an attempt to obtain relief from a federal judgment.[208] Thus, the remand was properly denied, because protecting a prior decision presented a federal question under the Fifth Circuit's *Villarreal v. Brown Express, Inc.*[209] decision. The plaintiff should not be allowed to circumvent the prior federal court dismissal by correcting the defect supporting the dismissal; rather, the earlier federal judgment was entitled to protection in subsequent actions.[210]

The dissent also abjured the majority's use of a well-pleaded complaint rule. The duty of the court was to go beyond the facts of the complaint and look for a controlling question of federal law.[211] If the majority had done so, they would have found a federal question,[212] and therefore would have sustained jurisdiction upon removal.[213] Given jurisdiction, the dissent would

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id. See supra* note 198.

205. *Id. Cf.* Louisville & Nashville R.R. v. Mottley, 211 U.S. 149 (1908) (no federal question jurisdiction based on a "lurking" federal defense).

206. 683 F.2d at 334.

207. *Id.* at 335 (Seth, C.J., dissenting).

208. *Id.* at 336.

209. 529 F.2d 1219 (5th Cir. 1976). In *Villarreal*, the plaintiff had settled a personal injury claim for $300,000 in federal district court, and the action was dismissed with prejudice. Plaintiff later brought a state court action against the defendant, claiming that the federal award was inadequate because the defendant had converted key evidence. The Fifth Circuit held that federal question removal was proper to protect the existing federal judgment. *Id.* at 1220-21.

210. 683 F.2d at 336 (Seth, C.J., dissenting).

211. *Id.* at 335.

212. *See supra* notes 208-10 and accompanying text.

213. 683 F.2d at 335-36 (Seth, C.J., dissenting).

have affirmed the district court's denial of the Rule 60(b) motion.[214]

Despite the strong dissent, the decision in *Fajen* limits the rule articulated in *Villarreal*. Unless a prior federal judgment is a material part of a subsequent action, protecting that prior judgment is an insufficient basis for federal question removal in the Tenth Circuit.

### D. *Retaining Jury Trial Rights After Removal*

The question of when a state right to a jury trial is retained upon removal pursuant to section 1442(a)(1)[215] was addressed in *City of Aurora v. Erwin*.[216] *City of Aurora* involved a petty offense action[217] in which Erwin, a United States postman, argued that he had an absolute right to a jury trial under state law[218] and that this right was retained upon removal.[219] Applying a two-part analysis, a Tenth Circuit panel majority determined that Erwin's right to a jury trial was retained following removal.[220] First, the Tenth Circuit noted that removal cannot supplant substantive state law, but that federal procedural rules preempt conflicting state rules.[221] Next, the court concluded that the Colorado statute providing for a jury trial was nonprocedural in character,[222] and that this right was therefore retained upon removal.

In reaching the court's conclusion, Judge McKay, writing for the majority, considered the limited purpose behind section 1442(a)(1). Citing *Arizona v. Manypenny*,[223] Judge McKay stated that section 1442(a)(1) was intended to permit a federal officer to assert immunity defenses in a forum free from local interests and prejudices.[224] Removal jurisdiction could "neither enlarge nor contract the rights of the parties."[225] Therefore, state law applies unless it is preempted by a federal procedural rule.[226]

Next, Judge McKay considered whether the Colorado statute providing jury trials in criminal petty offense actions was enacted for procedural or nonprocedural reasons. Although this determination was a federal question, the court observed that a state's purpose in granting the jury trial right is a significant factor in arriving at a final conclusion.[227] Probing into the history of the state statutory provision for a jury trial, the court concluded that

214. *Id.* at 336.

215. 28 U.S.C. § 1442(a)(1) (1982). This section permits removal to a federal court when the action is brought against a United States officer, or an agent of such officer, concerning an act within the scope of his or her office. *Id.*

216. 706 F.2d 295 (10th Cir. 1983).

217. The postman was charged with a petty offense after spraying a dog's owner with dog repellant. The offense took place on the "doggiest route in Aurora." *Id.* at 295 n.1.

218. *Id.* at 295. The defendant was entitled to a jury trial under Colorado law. *See* COLO. REV. STAT. § 16-10-109(2) (1978).

219. 706 F.2d at 296.

220. *Id.* at 299.

221. *Id.* at 296-97.

222. *Id.* at 298-99.

223. 451 U.S. 232 (1981).

224. 706 F.2d at 296.

225. Arizona v. Manypenny, 451 U.S. 232, 242 (1981), *quoted in City of Aurora*, 706 F.2d at 296-97.

226. 706 F.2d at 297. *See also* 28 U.S.C. § 2072 (1982).

227. 706 F.2d at 297.

the right was created as a direct response to the Colorado Supreme Court decision in *Austin v. City of Denver*.[228] In *Austin*, the state supreme court ruled that the right to a jury trial did not extend to petty criminal offenses. Shortly thereafter, the legislature enacted a statute granting such jury trial rights.[229] Since its enactment, the Colorado Supreme Court has characterized the statute as creating a substantive right,[230] albeit without articulation of a nonprocedural rationale to support that characterization. Judge McKay concluded that the jury trial right had been enacted, at least in part, for nonprocedural reasons, and therefore the right was retained as state substantive law upon removal to the federal court under section 1442(a)(1).[231]

In the dissenting opinion, Chief Judge Seth criticized the majority's conclusion that Erwin was entitled to a jury trial in federal court. Chief Judge Seth's primary argument was that "state laws cannot alter the essential character or functions of a federal court."[232] He reasoned that because a federal magistrate court does not hold jury trials for petty criminal offenses, the majority's decision alters this fundamental characteristic of the magistrate court.[233] The dissent concluded that, although the policy behind the Colorado law was relevant in assessing the rule's importance, it should not dictate the determination of what constituted a substantive right in a federal court.[234] Because the majority's decision altered the federal distribution of functions between judge and jury in the absence of convincing evidence of the substantive nature of the state jury trial right, Chief Judge Seth dissented.

## IV. MULTIPLE CLAIMS AND FINALITY UNDER RULE 54(b)

A basic policy in federal courts is that an appeal will lie only from a final decision.[235] A slight variation of that policy is provided in Rule 54(b).[236] Rule 54(b) allows particular orders which are not dispositive of an entire action to be treated as final and, therefore, reviewable.[237] The usual

228. 170 Colo. 448, 462 P.2d 600, *cert. denied*, 398 U.S. 910 (1970). *See* 706 F.2d at 298.

229. 706 F.2d at 298. *See* COLO. REV. STAT. § 16-10-109(2) (1978).

230. Garcia v. People, 200 Colo. 413, 615 P.2d 698 (1980); Hardamon v. Municipal Court, 178 Colo. 271, 497 P.2d 1000 (1972).

231. 706 F.2d at 299.

232. *Id.* at 300 (Seth, C.J., dissenting). As supporting authority, the chief judge cited two diversity jurisdiction cases, Byrd v Blue Ridge Coop., 356 U.S. 525 (1958) and Herron v. Southern Pac. Co., 283 U.S. 91 (1931). 706 F.2d at 299. The majority distinguished these cases because they were diversity cases, not section 1442(a)(1) actions, and therefore invoked different policy considerations. *Id.* at 299 n.10. In addition, the majority offered three other rebuttal arguments: *Byrd* concerned a seventh amendment, not a sixth amendment, jury right; like *Bryd*, *City of Aurora* furthered the federal policy of promoting jury trials; and, finally, *Byrd* has been subject to controversy. *Id.*

233. 706 F.2d at 300 (Seth, C.J., dissenting).

234. *Id.*.

235. *See supra* notes 1-8 and accompanying text.

236. FED. R. CIV. P. 54(b). Rule 54(b) reads in pertinent part:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

237. *See id.*

problem with Rule 54(b) is determining which trial court decisions are final. In this past term, the Tenth Circuit considered this question in light of the requirements and purposes of Rule 54(b).

### A. *Partial Damage Awards Are Not Final Under 54(b)*

In the per curiam decision *Wheeler Machinery Co. v. Mountain States Mineral Enterprises, Inc.*,[238] the Tenth Circuit held that a partial summary judgment, awarding only a portion of the damages claimed, is not a final judgment for purposes of Rule 54(b).[239] The district court in *Wheeler* granted partial summary judgment for the minimum undisputed amount Mountain States owed Wheeler under a contract, and declared that judgment final under Rule 54(b).[240] The Tenth Circuit dismissed Mountain States' appeal, concluding that the partial summary judgment was not final within the meaning of Rule 54(b).[241]

In determining whether the damages judgment was final, the Tenth Circuit relied on the definition of a Rule 54(b) final judgment set forth in the Supreme Court decisions *Sears, Roebuck & Co. v. Mackey*[242] and *Curtiss-Wright Corp. v. General Electric Co.*[243] *Sears* defined final judgment under Rule 54(b) as the ultimate disposition of one claim among several claims.[244] An "ultimate disposition" must meet the finality requirements of section 1291 even though it encompasses fewer than all the claims in an action.[245] The district court cannot, by certifying a decision as final, change the inherent nature of that decision.[246] Once finality is found, a Rule 54(b) appeal is permitted if the district court determines that there is no just reason for delay.[247]

In *Wheeler*, the partial summary judgment for damages left other damage claims arising from the same breach—interest, attorney fees, disputed principal—undetermined. The Tenth Circuit applied the rule, followed by other circuit courts,[248] that where a principal amount is awarded but an interest claim has yet to be determined, the award is not final for purposes of appellate review.[249]

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238. 696 F.2d 787 (10th Cir. 1983) (per curiam).

239. *Id.* at 789.

240. *Id.*

241. *Id.*

242. 351 U.S. 427 (1956). The Supreme Court held that Rule 54(b) is important for permitting timely appeals of adjudicated issues before all the issues in an action are determined. *Id.* at 437.

243. 446 U.S. 1 (1980).

244. 351 U.S. at 436, *quoted in Curtiss-Wright Corp.*, 446 U.S. at 7.

245. 351 U.S. at 438.

246. *Id.* at 437.

247. 446 U.S. at 8. The district court acts as a dispatcher, determining when Rule 54(b) certification is appropriate.

248. *See* Memphis Sheraton Corp. v. Kirkley, 614 F.2d 131, 131-32 (6th Cir. 1980); Acha v. Beame, 570 F.2d 57, 60 (2d Cir. 1978); Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66, 69 (2d Cir. 1973).

249. 696 F.2d at 789. The court also noted that a dispute over a portion of the principal precludes finality. *Id.*

B. *Rule 54(b) Finality and Class Action Damage Awards*

In *Strey v. Hunt International Resources Corp.*,[250] the Tenth Circuit also concluded that a damage award was not final and therefore not reviewable under Rule 54(b).[251] *Strey* was a class action in which the district court rendered a damage award without providing a method for dividing the fund among class members, for disposing of unclaimed shares, and for assessing attorney fees against the common fund.[252] The Tenth Circuit cited *Boeing Co. v. Van Gemert*[253] as supporting the rule that the absence of a formula for dividing the damage award created a lack of final judgment, and dismissed the appeal.[254]

C. *Rule 54(b) Certification Merges with Previous Orders to Create Final Judgment*

A notice of appeal must be filed within thirty days of an order or judgment in a civil action.[255] The timely filing of the notice of appeal is a condition precedent to appellate jurisdiction over the appeal.[256] The Tenth Circuit adheres strictly to this rule.[257] A prerequisite to appeal is a final order.[258] If the appeal is under Rule 54(b), the district court must expressly determine that the partial judgment is final, and must direct entry of judgment.[259] Without such certification, even a timely appeal is not reviewable.[260]

In *A.O. Smith Corp. v. Sims Consolidated, Ltd.*,[261] the Tenth Circuit held that a Rule 54(b) certification merges with a prior order disposing of a claim, and constitutes the final judgment for purposes of the thirty-day period for filing a notice of appeal.[262] *Garden City Production Credit Association v. Interna-*

250. 696 F.2d 87 (10th Cir. 1982). In another class action case, the Tenth Circuit held that an order which did not address the merits of the claim was not appealable under Rule 54(b). *See* Baker v. Bray, 701 F.2d 119 (10th Cir. 1983).

251. 696 F.2d at 88.

252. *Id.*

253. 444 U.S. 472 (1980).

254. 696 F.2d at 88. *See* 444 U.S. at 481 n.7.

255. FED. R. APP. P. 4(a)(1). The thirty-day rule is subject to exceptions, such as interlocutory appeals under 28 U.S.C. § 1292(b) (1982) and certain bankruptcy appeals.

256. Gooch v. Skelly Oil Co., 493 F.2d 366, 368 (10th Cir.), *cert. denied*, 419 U.S. 997 (1974) (timeliness is mandatory and jurisdictional).

257. The Tenth Circuit's strict adherence to the filing rule is represented by several opinions, not selected for routine publication, issuing this past term and dismissing cases for untimely appeals. *See, e.g.*, Boyd v. Shawnee Mission Pub. Schools, No. 82-1699 (10th Cir., Mar. 3, 1983); Robinson v. Audi NSU Auto Union, No. 82-1680 (10th Cir., Feb. 28, 1983); Myers v. Utah State Adult Probation & Parole Dept., No. 82-2171 (10th Cir., Dec. 13, 1982); United States v. Daniels, No. 82-2071 (10th Cir., Dec. 8, 1982); St. Louis-San Francisco Ry. v. Scott Fertilizer Co., No. 82-1510, No. 82-1561 (10th Cir., Oct. 27, 1982); United States v. Clayton, No. 82-1482 (10th Cir., Oct. 22, 1982); American Motorists Ins. Co. v. Resource Technology Corp., No. 82-1492 (10th Cir., Aug. 27, 1982); Herron v. Pendleton, Sabian & Craft. No. 82-1200 (10th Cir., Aug. 3, 1982); United States v. Afflerbach, No. 82-1667 (10th Cir., July 29, 1982).

258. 28 U.S.C. § 1291 (1982).

259. FED. R. CIV. P. 54(b). *Accord* Golden Villa Spa, Inc. v. Health Indus., Inc., 549 F.2d 1363, 1364 (10th Cir. 1977). *See also* United States v. Taylor, 632 F.2d 530 (5th Cir. 1980) (if no certificate of finality is issued, then appeal under Rule 54(b) should be dismissed).

260. Golden Villa Spa, Inc. v. Health Indus., Inc., 549 F.2d 1363 (10th Cir. 1977).

261. 647 F.2d 118 (10th Cir. 1981).

262. *Id.* at 121.

*tional Cattle Systems*[263] allowed the Tenth Circuit to reaffirm its holding in *A.O. Smith*.

The issue in *Garden City* was whether the court had jurisdiction over an appeal and cross-appeal filed prior to a Rule 54(b) certification. The district court had granted a partial summary judgment against only one defendant, International Cattle Systems (ICS), on November 20, 1981.[264] On January 7, 1982, that judgment was adjusted for interest due.[265] On February 24, 1982, the district court denied ICS's motion for reconsideration of the judgment.[266] A notice of appeal was filed by ICS on March 25, 1982, and another defendant cross-appealed on April 7, 1982.[267] Because the summary judgment was only partial, ICS then requested certification of its appeal under Rule 54(b); the district court issued the Rule 54(b) certificate on April 13, 1982.[268]

As the facts illustrate, ICS's notice of appeal was filed more than thirty days after the November 20 order and the January 7 order but prior to the Rule 54(b) certification. In determining its jurisdiction over the appeals, the Tenth Circuit answered two questions. First, the Tenth Circuit held the orders on summary judgment and interest were not final because not all of the parties' rights and liabilities were adjudicated.[269] Thus, jurisdiction over the original appeals was defective. Next, the Tenth Circuit considered whether the Rule 54(b) certification cured the jurisdictional defects in the notices of appeal. Relying on *A.O. Smith*, the court held that the Rule 54(b) certification did not cure the defects; rather, the certification merged with the prior orders to create a final judgment.[270] The notices of appeals pursuant to the original summary judgment orders were ruled premature, and the court would therefore have been required to dismiss the appeals except that a second set of appeal notices had been timely filed following the certification order.[271] *Garden City* reaffirms the holding of *A.O. Smith* and further emphasizes the importance of filing a timely notice of appeal.

## IV. COLLATERAL ORDER EXCEPTION TO FINALITY

Collateral orders are orders incidental to the primary action, and are exceptions to the final decision rule for appellate jurisdiction. Regardless of the status of the primary action, such orders are immediately appealable as final decisions provided certain factors are present.[272] The Tenth Circuit

263. No. 82-1387 (10th Cir., July 30, 1982).
264. *Id.* at 2.
265. *Id.*
266. *Id.* at 4.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 4-5. The court considered this second notice of appeal to be properly filed. *Id.* at 4-5.
272. The collateral order exception concerns orders "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Loan Corp. 337 U.S. 541, 546 (1949).

considered these factors, and their application in the context of a claim of absolute governmental immunity, in *Chavez v. Singer*.[273]

In *Chavez*, a federal government firefighter brought a tort action in federal district court against his supervisor, claiming that he had been injured as a result of his supervisor's negligent instructions.[274] The district court granted partial summary judgment denying the supervisor's asserted defense of absolute immunity.[275] The supervisor appealed this decision, claiming appellate jurisdiction existed under the collateral order exception.[276]

The four elements to be met before a collateral order exception will lie are: 1) the appeal must be from an order conclusively resolving a disputed question; 2) the question resolved must be collateral to and separate from the merits of the action; 3) the question must be effectively unreviewable on appeal from a final judgment; and 4) the appeal must present a serious and unsettled question.[277] The Tenth Circuit found the collateral order doctrine applicable by analogizing the absolute immunity issue to the double jeopardy issue presented to the Supreme Court in *Abney v. United States*.[278] The Tenth Circuit recognized that, like the double jeopardy issue, the absolute immunity issue should be addressed before trial because it determines whether the supervisor could be "haled into court" and would therefore not be subject to meaningful review.[279] Similarly, the question of immunity was distinct from the merits and was a serious and unsettled question.[280] Finally, the district court's ruling on the issue was conclusive.[281] The court therefore concluded that the immunity question was collateral to the main action; finding the appeal proper under the collateral order exception, the Tenth Circuit discussed the merits and affirmed the district court's ruling.[282]

## V. STANDARD OF REVIEW FOR SPECIAL MASTER'S RECOMMENDATION

Judges must be alert to the possibility that a jury may have reached a compromise verdict.[283] A judge cannot question a jury's deliberative process, but the judge's suspicion should be aroused when there is a close question on liability and the damage award is extremely inadequate.[284] If it is determined a compromise verdict was reached, then the judge should recom-

273. 698 F.2d 420 (10th Cir. 1983).
274. *Id.* at 421.
275. *Id.*
276. *Id.*
277. *Id.* The first three elements were set forth by the Supreme Court in Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). The final element was recognized in Nixon v. Fitzgerald, 457 U.S. 731, 742-43 (1982) (citing Cohen v. Beneficial Loan Corp., 337 U.S. 541, 547 (1949)).
278. 431 U.S. 651 (1977).
279. 698 F.2d at 421. *See also* 431 U.S. at 659.
280. 698 F.2d at 421.
281. *Id.*
282. *Id.* at 421-22.
283. A compromise verdict is reached when some jurors surrender their view on a material issue in return for similar action by other jurors on another issue, resulting in a verdict which is not shared by the jury. A common source for compromise verdicts is a disagreement on liability. Liability will be found, but only a small award of damages is given. *See, e.g.*, Lucas v. American Mfg. Co., 630 F.2d 291, 294 (5th Cir. 1980); Young v. International Paper Co., 322 F.2d 820, 823 (4th Cir. 1963).
284. *See supra* note 283.

mend a new trial. This was the problem presented in *National Railroad Passenger Corp. v. Koch Industries, Inc.*[285]

The jury in *National Railroad* returned a verdict finding the defendant ninety-nine per cent negligent and the plaintiff one per cent negligent, yet awarded damages only equaling what the plaintiff had paid third parties and ignoring the actual losses the plaintiff suffered.[286] Noting that liability was a hotly contested issue and that the defendant did not contest plaintiff's damages, the special master concluded that the jury had reached a compromise verdict and recommended a new trial.[287] Without reviewing the transcript, the district court judge rejected the special master's recommendation and ordered a new trial limited to the issue of damages.[288] The issues presented to the Tenth Circuit were the degree of deference the district court judge should give the special master's recommendation, and the degree of deference the Tenth Circuit should give to the district court judge's decision.

Addressing the first issue, the Tenth Circuit concluded that the abuse-of-discretion test should apply to its review of the district court's decision to reject the master's findings.[289] The Tenth Circuit recognized that if the trial judge alone had determined that a compromise verdict was reached and had ordered a new trial, or if the trial judge alone had ordered a new trial on damages, a circuit court would uphold the decision unless the record indicated an abuse of discretion.[290] The decision to grant a new trial based on the master's findings was entitled to similar deferential review.[291]

The Tenth Circuit then noted that a district court could abuse its discretion by failing to apply the proper standard of review to a master's recommendation.[292] When reviewing a masters's recommendation, a de novo determination was required, which meant that the district court could place whatever reliance it chose to on the special master's recommendations.[293] The district court, however, could not summarily ignore a recommendation based primarily upon credibility; rejecting such a recommendation without reviewing the record was an abuse of discretion.[294] The Tenth Circuit concluded that a finding of a compromise verdict was similar to a finding based on credibility, because the master's subjective impression of the trial was intimately tied to the conclusion that there had been a "hotly contested" issue

285. 701 F.2d 108 (10th Cir. 1983). A magistrate conducted the proceedings in the district court as a special master pursuant to 28 U.S.C. § 636(b)(2) (1982). 701 F.2d at 109. Section 636(b)(2) allows special master proceedings "upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure." Therefore, the limitations of Rule 53(b) (requiring the reference to a master to be the exception rather than the rule) need not be considered.

286. 701 F.2d at 110.

287. The special master discovered "no rational connection between the verdict rendered and the facts and evidence presented at the trial." *Id.*

288. *Id.* at 112.

289. *Id.* at 110-11.

290. *Id.*

291. *Id.* at 111.

292. *Id.*

293. *Id. See also* United States v. Raddatz, 447 U.S. 667, 674-75 (1980) (holding that congressional intent behind requiring de novo review of magistrate's findings required "sound exercise of judicial discretion," not a new hearing).

294. 701 F.2d at 111.

of liability.[295] The trial court was therefore required to review the transcript before rejecting the master's recommendation.[296] Because the trial court had failed to do so in *National Railroad*, it had abused its discretion; accordingly, the case was remanded for a decision based upon a review of the transcript.

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295. *Id.*
296. *Id.*

# LABOR LAW

## OVERVIEW

The Tenth Circuit's survey period labor law decisions produced few surprises, although spawning two dissents by Judge Barrett. Three significant cases are reviewed below. These decisions gain their interest either from their clarification of existing law or their refusal to move from precedent despite convincing challenges. While the Tenth Circuit was not in the forefront of labor law reform during this edition of the survey, in two areas—threats which constitute strike misconduct and the use of presumptions in unfair labor practice hearings—the court addressed issues of national relevance.

## I. THREATS AS STRIKE MISCONDUCT

### A. *Existing Standards for Strike Misconduct*

In *Midwest Solvents, Inc. v. NLRB*,[1] a Tenth Circuit panel majority refused to join two sister circuits in rejecting the National Labor Relations Board's (NLRB or Board) standard for determining when threats are misconduct sufficient to justify an employer's refusal to reinstate a striking employee.[2] The First[3] and Third[4] Circuits have adopted an "objective" test, under which threats themselves will be deemed strike misconduct if, under the circumstances in which they were uttered, the threats could reasonably

1. 696 F.2d 763 (10th Cir. 1982).

2. 696 F.2d at 767. The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982), protects concerted employee activity, including strikes. *See id.* §§ 157-163. This protection, however, is not absolute.

An employer must rehire employees involved in an economic strike if positions are open following the strike. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967). Failure to reinstate striking employees to available positions constitutes an unfair labor practice, because without the reinstatement requirement an employer could chill the right to strike by penalizing those who exercise this right. *Id.* The employer, however, can refuse to reinstate striking employees if the refusal is not motivated by an anti-union purpose, but is instead based upon a legitimate and substantial business reason. NLRB v. Great Dane Trailers Co., 388 U.S. 26, 34 (1967). Individual strike misconduct, such as a coercive or threatening act directed at nonstriking workers, furnishes a legitimate basis for refusing to reinstate a striking employee because such misconduct does not involve the exercise of a protected right and because such misconduct can render an employee "unfit for further service." NLRB v. Illinois Tool Works, 153 F.2d 811, 815-16 (7th Cir. 1946). *See also* Associated Grocers of New England v. NLRB, 562 F.2d 1333 (1st Cir. 1977); NLRB v. W.C. McQuaide, Inc., 552 F.2d 519 (3d Cir. 1977); NLRB v. Wichita Television Corp., 277 F.2d 579 (10th Cir. 1960); NLRB v. Cambria Clay Prod. Co., 215 F.2d 48 (6th Cir. 1954). *Cf.* NLRB v. Fansteel Meltallurgical Corp., 306 U.S. 240, 253 (1939) (employer not compelled to reinstate employees committing torts against the employer's property; to require reinstatement of such employees would hinder labor law's purpose of seeking peaceful solution to labor disputes). Not all misconduct is sufficiently serious to justify refusal to reinstate. *See, e.g.*, Montgomery Ward & Co. v. NLRB, 374 F.2d 606, 608 (10th Cir. 1967). The issue in strike misconduct cases is therefore determining which kinds of misconduct are sufficiently serious to justify refusal to reinstate. *See, e.g.*, *Midwest Solvents*, 696 F.2d at 766.

3. Associated Grocers of New England v. NLRB, 562 F.2d 1333 (1st Cir. 1977).

4. NLRB v. W.C. McQuaide, Inc., 552 F.2d 519 (3d Cir. 1977).

"coerce or intimidate" non-striking employees.[5] The NLRB, however, applies an "animal exuberance" test, under which threats alone cannot justify refusal to reinstate.[6] In order to constitute strike misconduct under the NLRB standard a striker's threats must be "accompanied by . . . physical acts or gestures that would provide added emphasis or meaning to [the] words."[7] Interestingly, in *Midwest Solvents* the Tenth Circuit both refused to adopt the objective test and denied that it was applying the animal exuberance test.[8]

B. *Midwest Solvents*

The *Midwest Solvents* case arose out of a twenty-nine day economic strike.[9] Following the strike the employer, Midwest, refused to reinstate two strikers, Donald and Roy Lassen, accusing them of strike misconduct.[10] The Lassen's brought unfair labor practice charges against Midwest resulting in an administrative law judge's order of reinstatement.[11] Midwest appealed this order and the NLRB affirmed the administrative judge,[12] as did the Tenth Circuit.[13]

Donald Lassen was charged with two instances of misconduct.[14] The first involved a visit, accompanied by another striker, to the apartment of Bob Call, a non-striking worker.[15] Call refused to open the door, and therefore could not identify which of the two strikers told him he better "watch" himself because "some of the boys might get rowdy."[16] Midwest also charged Donald Lassen with threatening three college students temporarily working at its plant.[17] Only Lassen and a companion testified about what

5. *Associated Grocers*, 562 F.2d at 1336 (quoting *McQuaide*, 552 F.2d at 528); *McQuaide*, 552 F.2d at 528. The *McQuaide* court adopted the standard set out in Local 542, Int'l Union of Operating Eng'rs v. NLRB, 328 F.2d 850 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964), wherein the court stated: "The test of coercion and intimidation is not whether the misconduct proves effective. The test is whether the misconduct is such that, under the existing circumstances, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." 328 F.2d at 852-53 (*quoted in McQuaide*, 552 F.2d at 527-28). *Local 542* articulated the "objective" test for coercion in the context of an unfair labor charge brought against a union, not an employer. 328 F.2d at 852.

6. *E.g.*, *McQuaide*, 552 F.2d at 527. The phrase "animal exuberance" is taken from Milk Wagon Drivers Union, Local 752 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941). *Meadowmoor* held that picketing could not be suppressed merely because the pickets engaged in "a trivial rough incident or a moment of animal exuberance." *Id.* at 293.

7. *McQuaide*, 552 F.2d at 527.

8. 696 F.2d at 767.

9. An economic strike is a strike to secure union demands, rather than a protest against an employer's unfair labor practices. *See* NLRB v. Juniata Packing Co., 464 F.2d 153, 155 (3d Cir. 1972).

10. 696 F.2d at 765. Midwest originally refused to reinstate six striking workers. After further investigation Midwest allowed one of the six to return to work. Two others did not challenge Midwest's action. The remaining three, Donald, Roy and Harold Lassen, filed unfair labor practice charges against Midwest based on the failure to reinstate. *Id.*

11. *Id.*

12. Midwest Solvents, Inc., 251 N.L.R.B. 1282, 1282 (1980), *enforced*, 696 F.2d 763 (10th Cir. 1982).

13. *See* 696 F.2d at 767.

14. *Id.* at 766.

15. *Id.*

16. *Id.*

17. *Id.*

was said to the three; they denied threatening the students although Lassen admitted asking them not to be "scabs."[18]

At the preliminary hearing, the administrative law judge (ALJ) determined that Donald Lassen had threatened both Call and the three college students.[19] The ALJ found, however, that both threats were isolated incidents insufficient to warrant denial of reinstatement.[20] The NLRB affirmed this decision, noting that there was no evidence that the threats were anything more than "the type of impulsive, trivial misdeed which we have found, in the past, to be insufficient to warrant a denial of reinstatement to a protected striker."[21]

The Tenth Circuit affirmed the Board's order, holding that "[absent] other threatening statements or . . . some coercive action, [Lassen's statements were] too ambiguous to be considered a threat."[22] In support of this conclusion the court cited *NLRB v. W.C. McQuaide, Inc.*,[23] yet refused to adopt *McQuaide's* objective test.[24] Apparently, therefore, the presence of two strikers outside the apartment door of a non-striker is not a coercive action sufficient to raise a threat to the level of strike misconduct.

Roy Lassen was denied reinstatement because, while picketing, he threatened Donald Caudle, a farmer making deliveries across the picket line to Midwest's plant.[25] Roy said that he would blow up or burn up Caudle's combine if Caudle continued making deliveries.[26] Caudle subsequently crossed the picket line several times without further interference from the strikers.[27]

The NLRB characterized Roy's threat as minor misconduct and ordered reinstatement.[28] The court of appeals enforced the Board's order for several reasons: 1) there was a question as to whether Roy Lassen made the threat;[29] 2) Caudle apparently was not frightened by the threat;[30] and 3) Caudle was free from subsequent interference.[31] The court characterized Roy Lassen's statement as "animal exuberance, the result of high emotions

18. *Id.* at 767.
19. 251 N.L.R.B. at 1291.
20. *Id.* at 1292.
21. *Id.* at 1282.
22. 696 F.2d at 766 (citing *McQuaide*, 552 F.2d at 766).
23. 552 F.2d 519 (3d Cir. 1977).
24. 696 F.2d at 767. The court's supporting citation to *McQuaide* is problematic because *McQuaide* adopted the "objective test" which the Tenth Circuit conspicuously avoided. *Id.* Apparently the court was only attempting to show that Donald Lassen's conduct did not constitute strike misconduct by *any* standard. The citation may also have been an indication that the court is willing to find misconduct through threats alone in the proper case. *Cf. id.* at 766 (no strike misconduct "in absence of other threatening statements *or* of some coercive action") (emphasis supplied).
25. *Id.* at 767.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 767 n.4. The opinion had previously noted that an employer's determination not to reinstate for strike misconduct must be based on evidence that the striker personally engaged in the alleged misconduct. *Id.* at 765 (citing NLRB v. Wichita Television Corp., 277 F.2d 579 (10th Cir. 1960)).
30. 696 F.2d at 767.
31. *Id.*

and frustration on the picket line," and therefore protected conduct.[32]

The majority appears to have been content to defer to the expertise of the Board in determining the misconduct issue. The court found the Board's decisions supported by substantial evidence and declined to rule on Midwest's contention that the Board had applied an improper test. Instead, the court held that "[t]he refusal to reinstate would not be proper under any of the standards suggested by Midwest. Accordingly, we need not decide the merits of the objective test."[33]

Judge Barrett, the sole dissenter, disagreed with the majority and would have adopted the objective test.[34] By this test, Judge Barrett reasoned, the actions of Roy and Donald Lassen would "clearly constitute such misconduct which amounts to coercion and intimidation" warranting denial of reinstatement.[35]

Curiously, Judge Barrett injected a strong element of subjectivity into the objective test when he observed that the ALJ found that the Lassens' conduct placed others in fear, and that it was his view that the Lassens' actions were *calculated* threats.[36] While Judge Barrett's observations may have been offered solely as evidentiary support of the objective unreasonableness of the Lassens' conduct, his comments do reflect the subjective basis upon which several circuits have decided strike threat cases. Although the standard is often not articulated, threats have been characterized on the basis of their effect on the non-striker,[37] or on the striker's subjective intent.[38]

### C. *Evaluation of Standards for Characterizing Threats as Strike Misconduct*

#### 1. Subjective Approach

Subjective tests have the obvious disadvantage of being difficult to apply. Intent and effect do not always admit of easy discovery. Although the effect of a threat may be manifest in the reaction of a non-striker, the lack of response may indicate no more than the non-striker's bold constitution or his desperate need of a job. Similarly, if the intent of the striker is the test, the court is placed in the dubious position of having to determine just how serious the striker is about carrying out the threat. Further, the striker is punished for his state of mind, not, as is more appropriate, for engaging in inexcusable conduct.

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32. *Id.*

33. *Id.*

34. *Id.* at 768 (Barrett, J., dissenting).

35. *Id.*

36. *Id.*

37. *See* NLRB v. Trumbull Asphalt Co., 327 F.2d 841, 846 (8th Cir. 1964) (threats were misconduct when they resulted in non-striker leaving work for five weeks); NLRB v. Efco Mfg., Inc., 227 F.2d 675 (1st Cir. 1955), *cert. denied*, 350 U.S. 1007 (1956) (threats were misconduct when they placed employer in fear of imminent beating).

38. *See* NLRB v. Pepsi Cola Co., 496 F.2d 226, 228 (4th Cir. 1974) (line drawn at "conduct that is intended to threaten or intimidate non-strikers"). *See also* NLRB v. Hartmann Luggage Co., 453 F.2d 178 (6th Cir. 1971) (distinguishing picket line rhetoric from threats intended literally).

2. The "Animal Exuberance" Standard

The NLRB suggests use of the animal exuberance test, under which threats alone can never justify a refusal to reinstate.[39] The test ensures that strikers are not to suffer the harsh penalty of losing their jobs because of impulsive words spoken in the heat of the moment during the course of a protected activity. The test overlooks, however, an employee's right *not* to join in a concerted activity, guaranteed by section 7 of the National Labor Relations Act.[40] Section 8(b)(1) of the National Labor Relations Act[41] makes it an unfair labor practice for a union to restrain or coerce employees in the exercise of section 7 rights. Although the strike misconduct of an individual is not an unfair labor practice, clearly a significant part of Congress' intent in enacting section 7 was to protect the employee's right of choice. To assert that words alone cannot intimidate is to shut one's eyes to the coercive power of language, and to subvert a worker's right of choice. The animal exuberance test therefore protects the striking worker's rights at the expense of the non-striking worker.

The First and Third Circuits criticize the "animal exuberance" test in other terms. In *Associated Grocers of New England v. NLRB*,[42] the First Circuit found the "animal exuberance" test "too inelastic to provide a reliable means for distinguishing serious misconduct or threats from protected activity."[43] A similar rationale pervaded the Third Circuit's *McQuaide* opinion; the *McQuaide* court framed the question as "whether a threat is sufficiently egregious not whether there is added emphasis."[44]

3. The "Objective" Test

Realizing that the problem presented by strike misconduct is to distinguish actions sufficiently egregious to justify refusal to reinstate while simultaneously preserving the vitality of collective action,[45] the objective test proposes a solution in the ubiquitous "reasonable person." The test is whether a threat reasonably tends to coerce or intimidate, ensuring that neither employer nor worker is penalized for engaging in arguably proper activity. The test does not require a physical gesture,[46] thereby recognizing the coercive potential of words and protecting an employee's right of choice.

The equitable nature of the objective test is further demonstrated by its

39. *Associated Grocers*, 562 F.2d at 1336; *McQuaide*, 552 F.2d at 528. The Eleventh Circuit has found that the animal exuberance test gives better protection to an employee's right to engage in concerted activity than does the objective test. Georgia Kraft Co. v. NLRB, 696 F.2d 931, 939 (11th Cir. 1983).

40. 29 U.S.C. § 157 (1982). This section provides, in relevant part, that "[e]mployees shall have the right . . . to engage in . . . concerted activities . . . and shall also have the right to refrain from any or all of such activities. . . ." *Id.*

41. 29 U.S.C. § 158(b)(1) (1982).

42. 562 F.2d 1333 (1st Cir. 1977).

43. *Id.* at 1336.

44. 552 F.2d at 527. The court observed that focusing on the presence of physical activity fails to concentrate the inquiry upon the actual nature of an employee's conduct. *See id.*

45. *See supra* note 2.

46. *E.g.*, *McQuaide*, 552 F.2d at 527.

application. The objective test does not find strike misconduct in words alone without the added weight of surrounding circumstances.[47] Misconduct through threats has been found in strikes marked by incidents of vandalism and harassment,[48] where non-strikers have been followed to delivery points,[49] or to their homes,[50] or when their egress has been blocked.[51] A threat in such circumstances has added coercive force, as it does when the threat is made with forty to fifty picketers nearby.[52]

The objective test, as applied, has also had a subjective element. For example, Judge Barrett's dissent relied on evidence that the Lassens' threats had placed other employees in fear.[53] Similarly, the *Associated Grocers* court noted that a threatened applicant left the premises of the plant without submitting an application;[54] evidently the court found the applicant's motive significant, even though motive is intrinsically subjective. While consideration of subjective reaction may be important in characterizing the reasonableness of strike-related conduct, it is important to strictly limit the weight given such evidence. To effectively separate reasonable and unreasonable conduct, the objective test must go beyond the reactions of individuals in a particular case.[55]

### D. *Conclusion*

The refusal by the Tenth Circuit to apply the objective test may signify nothing more than that *Midwest Solvents* was the wrong case in which to disrupt precedent. Strike misconduct is an area in which the conscience of the court might be easily aroused. If, in another case, the animal exuberance test would require reinstatement, but the threats, given the surrounding circumstances, were clearly coercive, the Tenth Circuit might adopt the objective test. In doing so, the court would be reaching a result more consistent with the National Labor Relation Act's goal of facilitating industrial peace[56]

47. "The test is whether the misconduct is such that, *under the circumstances existing*, it may reasonably tend to coerce or intimidate. . . ." *Id.* at 528 (quoting Local 524, Int'l Union of Operating Eng'rs v. NLRB, 328 F.2d 850, 852-53 (3d Cir.), *cert. denied*, 379 U.S. 826 (1964)) (emphasis supplied).

48. *McQuaide*, 552 F.2d at 528. *See also* Firestone Tire & Rubber Co. v. NLRB, 449 F.2d 511, 512 (5th Cir. 1971), in which the Fifth Circuit articulated no standard, but found strike misconduct in a vulgar invective and hand sign; it may have been significant that the striker involved had been engaged in other, more violent activity during the strike. *See id.* at 512-13.

49. *McQuaide*, 552 F.2d at 526-27.

50. *Associated Grocers*, 562 F.2d at 1337.

51. *Id.*

52. *Id.* at 1336.

53. *See supra* notes 34-36 and accompanying text.

54. *Associated Grocers*, 562 F.2d at 1336.

55. *Associated Grocers* demonstrates the proper approach to the use of evidence of subjective reaction. The *Associated Grocers* court remanded to the Board, with instructions to apply the objective test, the case of a striker ordered reinstated because his threats had not deterred a non-striker from applying for a position. The court rejected the notion that filing the job application proved the applicant had not been coerced, noting that while the applicant's subjective reaction was important, that reaction could not in itself satisfy an inquiry into the objective reasonableness of the striker's conduct. *Id.* at 1337.

56. *See, e.g.*, NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 253 (1939); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-43 (1937).

and protecting an employee's freedom of choice.[57]

## II. NLRB USE OF PRESUMPTIONS WHEN CERTIFYING HEALTH CARE BARGAINING UNITS

*Beth Israel Hospital and Geriatric Center v. NLRB*[58] (*Beth Israel II*) was an en banc rehearing of an employer challenge claiming that due process protections precluded use of a presumption of unit appropriateness at an unfair labor practice hearing seeking to force an employer to negotiate with a certified employee bargaining unit.[59] The Tenth Circuit rejected the challenge, holding that reliance on the presumption of unit appropriateness was permissible, even though the presumption relieved the Board's General Counsel[60] of the burden of persuasion on an element of an unfair practice charge.[61] Chief Judge Seth and Judge Barrett dissented from this holding.[62]

### A. *Background*

The NLRB's General Counsel, as the moving party in an unfair labor practice hearing, has the burden of persuasion on the unfair practice charge.[63] The Board, however, had permitted the General Counsel to rely on a presumption which required the employer to prove the inappropriateness of a previously certified unit.[64] Employers appealed this action, contending that because the issue of appropriateness was central to the unfair practice charge, due process required that the General Counsel bear the bur-

57. *See supra* notes 38-40 and accompanying text.

58. 688 F.2d 697 (10th Cir.), *cert. dismissed per stipulation*, 103 S. Ct. 433 (1982).

59. The NLRB has the responsibility for determining which employee units are appropriate for collective bargaining purposes. 29 U.S.C. § 159(b) (1982). Certification of a bargaining unit as appropriate is made following a nonadversarial representation hearing. *See* 29 C.F.R. § 101.21 (1983). *Accord* Inland Empire District Council, Lumber & Sawmill Workers Union v. Millis, 325 U.S. 697, 706 (1945). The certification decision can be made either directly by the Board or by one of its regional directors. 29 U.S.C. §§ 153(b), 159(b) (1982); 29 C.F.R. § 101.21 (1983). This function is generally referred to as "determining unit appropriateness."

Once a bargaining unit has been certified, an employer is required to negotiate with that certified unit, *see* 29 U.S.C. § 158(a)(5) (1982); failure to do so constitutes an unfair labor practice. *Id.* There is no right to have a certification decision reviewed directly. A.F. of L. v. NLRB, 308 U.S. 401 (1940). *Accord* Magnesium Casting Co. v. NLRB, 401 U.S. 137, 139 (1971). To obtain judicial review of the determination the employer must refuse to bargain with the certified unit, be charged with an unfair labor practice, and raise the inappropriateness of the bargaining unit as a defense in the unfair labor practice proceeding. A.F. of L. v. NLRB, 308 U.S. 401 (1940). The circuit courts then have power to review the determination of unit appropriateness through the grant of jurisdiction to review the Board's unfair labor practice decisions. *See* 29 U.S.C. §§ 160(e)-(f) (1982). Because the unit certification reflects on exercise of the Board's discretion, however, the finding of unit appropriateness cannot be overturned unless the Board has abused its discretion. *Beth Israel II*, 688 F.2d at 699-700; *see* Packard Motor Co. v. NLRB, 330 U.S. 485, 491 (1947).

60. The NLRB's General Counsel represents the agency in unfair practice proceeding. *See* 29 U.S.C. § 153(d) (1982).

61. *Beth Israel II*, 688 F.2d at 701.

62. *See id.* at 701 (Barrett, J., dissenting); *id.* at 704 (Seth, C.J., dissenting).

63. Presbyterian/St. Luke's Medical Center v. NLRB, 653 F.2d 450, 456 (10th Cir. 1981), *overruled in part*, Beth Israel Hosp. and Geriatric Center v. NLRB, 688 F.2d 697 (10th Cir.), *cert. dismissed per stipulation*, 103 S. Ct. 433 (1982).

64. *See* Beth Israel Hosp. and Geriatric Center v. NLRB, 677 F.2d 1343, 1345 (10th Cir. 1981) (*Beth Israel I*), *rev'd in part*, 688 F.2d 697 (10th Cir.) (en banc rehearing), *cert. dismissed per stipulation*, 103 S. Ct. 433 (1982).

den of persuasion on this issue.[65] This argument was supported by citation to Federal Rule of Evidence 301,[66] which Congress had expressly made applicable to unfair labor practice hearings "so far as practicable."[67] Because Rule 301 bars presumptions shifting the burden of persuasion, the Board's approval of a burden-shifting presumption allegedly vitiated the due process protection provided by allocating the burden of proof to the General Counsel,[68] thereby violating the employers' rights.

The challenge outlined above was first considered by a Tenth Circuit panel in *Presbyterian/St. Luke's Medical Center v. NLRB*.[69] *Presbyterian/St. Luke's* held that the Board could not permit the use of a presumption which required the employer to bear the burden of persuasion on its contention that a certified bargaining unit was inappropriate.[70] Proof that a certified bargaining unit is appropriate is necessary to establish that the asserted unfair practice (refusal to bargain)[71] has occurred.[72] Because the Federal Rules of Evidence, including Rule 301, were applicable to the unfair practice hearing,[73] it was impermissible to use a presumption which shifted the burden of proof on any element of the unfair practice charge.[74] Two panel decisions following this holding were the subject of the en banc rehearing in *Beth Israel II*.[75]

### B. *The Majority Opinion*

The majority in *Beth Israel II* overruled the *Presbyterian/St. Luke's* restriction on the use of presumptions of unit appropriateness at unfair labor prac-

65. *See generally Beth Israel II*, 688 F.2d at 702-704 (Barrett, J., dissenting). The majority opinion does not address the employers' challenge in due process terms, which may be a central flaw in the opinion. *See infra* notes 96-99 and accompanying text.

66. FED. R. EVID. 301 provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with the evidence, to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

67. *See* 29 U.S.C. § 160(b) (1982).

68. *Cf.* Addington v. Texas, 441 U.S. 418 (1979) (recognizing that burden of proof acts as due process procedural mechanism).

69. 653 F.2d 450 (10th Cir. 1981), *overruled in part*, Beth Israel Hosp. & Geriatric Center v. NLRB, 688 F.2d 697 (10th Cir.) (en banc), *cert. dismissed per stipulation*, 103 C. St. 433 (1982).

70. 653 F.2d at 456. *Presbyterian/St. Luke's* also held that the Board could not rely on its traditional "community of interests" test when certifying health care bargaining units, but must apply a "disparity of interests" test. *Id.* at 457. Further, the Board was required to include a specific statement explaining why the certified unit did not result in an undue proliferation of bargaining units in the health care industry. *Id.* This holding, although not before the Tenth Circuit in *Beth Israel II*, *see* 688 F.2d at 698, was expressly approved by the circuit en banc. *Id.* at 700.

71. *See* 29 U.S.C. § 158(a)(5) (1982).

72. *See* 653 F.2d at 456. For a fuller explanation of the refusal-to-bargain unfair labor practice, see *supra* note 59.

73. 653 F.2d at 456.

74. *Id.*

75. Beth Israel Hosp. & Geriatric Center v. NLRB, 677 F.2d 1343 (10th Cir. 1981) (*Beth Israel I*), *rev'd in part*, 682 F.2d 697 (10th Cir.) (en banc), *cert. dismissed per stipulation*, 103 S. Ct. 433 (1982); St. Anthony Hosp. System v. NLRB, 655 F.2d 1028 (10th Cir. 1981), *rev'd in part*, 688 F.2d 697 (10th Cir.) (en banc), *cert. dismissed per stipulation*, 103 S. Ct. 433 (1982).

tice hearings.[76] The first step in reaching this decision was an examination of the nature of the decision to certify a bargaining unit as appropriate. Certification of unit appropriateness is initially made at a representation hearing.[77] Congress intended that the determination of unit appropriateness be made primarily through the Board's exercise of its expertise and experience with the labor relations problems existing in a particular economic sphere.[78] Thus, the process of unit determination at the representation hearing was not subject to strict rules of evidence; the Board was entitled to make its initial determination of appropriateness through the use of any procedural devices—including presumptions creating a burden of persuasion—which were justified by experience and which were not arbitrary.[79]

The majority's second step was to examine Supreme Court precedent concerning the Board's obligation to make an independent review of a unit certification when that certification is challenged through an unfair practice proceeding. Citing *Magnesium Casting Co. v. NLRB*,[80] the majority stated that the Supreme Court had established that the Board was not required to reconsider the issue of unit appropriateness during the unfair practice proceeding.[81] Rather, the Board had discretion to require rehearing on the issue, adopt the conclusion entered following the representation hearing, or make an independent decision.[82]

In light of the two principles of law discussed above, the majority concluded that the question of unit appropriateness was not a factual question to be resolved during the unfair practice hearing.[83] Accordingly, the General Counsel had no burden of persuasion on the issue of unit appropriateness, and the Federal Rules of Evidence did not provide a procedural framework for determining whether the bargaining unit had been properly certified.[84] Essentially, because the determination of unit appropriateness was committed to Board discretion, Rule 301 could not control the Board's use of presumptions.[85] Hence, the Board's use of a presumption "violating" Rule 301 did not, in the context of a determination of unit appropriateness, constitute a denial of due process.[86] Additionally, because judicial review existed to ensure that the Board's discretion was not exercised arbitrarily, excluding the issue of unit appropriateness from the unfair practice hearing's adver-

76. *See Beth Israel II*, 688 F.2d at 698, 700-01.

77. *See supra* note 59.

78. *See* 688 F.2d at 699.

79. *Id.*

80. 401 U.S. 137 (1971).

81. 688 F.2d at 700-01 (citing Magnesium Casting Co. v. NLRB, 401 U.S. 137, 141 (1971)). *Accord* Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 161 (1941).

82. 688 F.2d at 700-01.

83. *Id.* at 701.

84. *Id.* at 700-01.

85. *Id.*

86. The majority does not address the question on rehearing in terms of the denial vel non of due process. The question presented to the court, however, was whether due process protection permitted use of a presumption relieving the General Counsel of the burden of persuasion on any element of the unfair practice charge. *Id.* at 702 (Barrett, J., dissenting). Thus, the majority's reasoning and conclusion have been presented in terms of their due process implications.

sarial environment did not deny an employer's due process rights.[87]

C. *The Dissents*

1. Judge Barrett

Judge Barrett's dissent was premised on his perception that due process required that an employer be accorded a full adversarial hearing on every element of the unfair practice charge.[88] There was no indication in the National Labor Relations Act that the issue of unit appropriateness was entitled to unique treatment; rather, the Act stated that the Federal Rules of Evidence were applicable to *all* unfair practice proceedings.[89] Further, the Rules were made applicable to unfair practice proceedings in order to provide protection against arbitrary action by the Board.[90] The majority's holding was therefore directly and indirectly[91] contrary to the statutorily mandated restrictions of Rule 301. Additionally, the majority's holding subverted the judiciary's power to provide a meaningful guarantee against arbitrary Board decisions. Judge Barrett would have upheld *Presbyterian/St. Luke's* and held that due process bars the use, in an unfair practice proceeding,[92] of a presumption which relieves the General Counsel of the burden of persuasion on any element of an unfair practice charge.[93]

2. Chief Judge Seth's Dissent

Chief Judge Seth's dissent was grounded in his concern that the majority's holding would render judicial review of this class of unfair practice charges virtually useless. By permitting the Board to use a presumption which relieved it of the burden of producing *any* evidence, the court would not have a meaningful basis for determining whether the Board had acted arbitrarily.[94] Excusing the Board from producing evidence by characterizing unit appropriateness as a nonfactual, discretionary determination would eliminate the check on arbitary action provided by a record setting forth all facts constituting a basis for agency action.[95] Because application of Rule

87. *See id.* at 701.

88. Judge Barrett succinctly captured the essence of his dissent in summing up his opinion:

> In any unfair labor practice proceeding, there must be a full and complete adversarial hearing. The hospitals were not accorded such a proceeding. The Board was obligated to present evidence in the unfair labor practice proceedings (through its General Counsel) which effectively met the burden of persuasion. This and this only could meet the measure of a "full and adequate" hearing . . . .

*Id.* at 704 (Barrett, J., dissenting).

89. *Id.* at 703 (citing 29 U.S.C. § 160(b) (1982)).

90. *See* 688 F.2d at 703-04 (Barrett, J., dissenting).

91. In addition to finding a direct contravention of Rule 301 in the majority holding, Judge Barrett characterized the majority's approach as permitting the Board to treat a presumption as evidence, and stated that this was an impermissible use of presumption under Rule 301. *Id.* at 702 (citing J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 301-4 to 301-7 (1982)).

92. Judge Barrett limited his analysis to the use of presumptions at unfair practice proceedings. 688 F.2d at 701 (Barrett, J., dissenting).

93. *Id.* at 704.

94. *Id.* at 705 (Seth, C.J., dissenting).

95. *Id.* at 706.

301 to the unfair practice proceeding would ensure the necessary record while the majority's approach would not, Chief Judge Seth dissented.

D. *Analysis*

There are two significant shortcomings in the majority opinion. The first is its failure to examine the legislative intent behind the statutory requirement to apply the Federal Rules of Evidence to unfair practice proceedings. The statute only requires that the Rules be used so far as practicable.[96] The majority's recognition of an exception to this mandate would have been more convincing if the opinion had demonstrated that the statutory requirement was not intended to affect the characterization of a particular issue as factual, or if the opinion had demonstrated that it was not "practicable" to apply the Rules to the issue of unit certification.

The second, more serious flaw is the failure to demonstrate that the rule of *Magnesium Casting*[97] was applicable when the Board reviewed certification decisions based primarily upon a Board-created presumption. *Magnesium Casting* and *Pittsburgh Plate Glass Co. v. NLRB*,[98] its progenitor, both involved review of unfair labor practice proceedings following certification hearings which had resulted in fully developed records. It was in that context that the Court held that the two procedurally distinct proceedings were essentially two parts of a unitary proceeding, and that it was therefore unnecessary, at the unfair practice proceeding, for the Board to reconsider its decision entered following the representation hearing.[99] The majority opinion in *Beth Israel II* would clearly have been a more valuable precedent had it explicitly considered the extent to which due process concerns are satisfied by a unitary proceeding in which the government relies throughout on a presumption. Similarly, the opinion would have gained persuasiveness had it engaged in the interest balancing methodology the Supreme Court has adopted for due process challenges to the adequacy of a particular agency proceeding.[100]

Although the majority opinion might have been strengthened by including either or both of the above analyses, it does appear to adequately respond to the due process concerns raised by the dissenters. Determination of an appropriate bargaining unit *is* a function which is primarily committed to the NLRB and which requires a significant degree of expertise. The majority's approach would prevent arbitrary action by retaining judicial review of the rationality of a particular presumption.[101] Additionally, the em-

96. *See* 29 U.S.C. § 160(b) (1982).

97. *See supra* notes 80-82 and accompanying text.

98. 313 U.S. 146 (1941).

99. *Id.* at 158-62.

100. *E.g.*, Mathews v. Eldridge, 424 U.S. 319 (1976). A Tenth Circuit panel recently recognized that it should not dispose of due process challenges on the basis of Supreme Court precedent which did not address the exact challenge before the court and which was decided before the era of interest-balancing jurisprudence. *See* United States v. Schell, 692 F.2d 672 (10th Cir. 1982). Although *Schell* was a criminal case, no compelling reason exists not to apply its cautious approach to due process challenges when considering civil cases.

101. *Cf.* 688 F.2d at 699 (courts should defer to NLRB discretion and expertise, including presumptions drawn from past experience, subject to showing of reasonableness).

ployer always has the chance to meet the burden of persuasion imposed by the presumption of appropriateness.[102]

One final point deserves mention. NLRB regulations state that the purpose of a representation hearing is to develop "as full a statement of the pertinent facts as may be necessary for determination of the case."[103] Neither the majority or dissenting opinions examine whether use of a presumption eliminating the obligation of *any* party to introduce evidence of appropriateness is consistent with existing regulations.

## III. "BENCHING" AS INTERNAL UNION DISCIPLINE

The dispute in *Hackenburg v. International Brotherhood of Boilermakers*[104] had its roots in a wildcat strike by the ten plaintiffs.[105] The Union imposed, as a penalty for the strike, a ninety day "benching," that is, deprivation of assignment to jobs through the Union-controlled hiring hall.[106] The sanction was imposed pursuant to a provision in the collective bargaining agreement with the employer which required the Union to "bench" members fired for misconduct.[107]

Suit was brought in federal district court by the plaintiffs, alleging that the benching violated Colorado labor law, that the Union breached its duty to fairly represent its members (through entering into a collective bargaining provision calling for benching of fired employees), and that the summary benching violated section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959[108] (Landrum-Griffin Act), which provides procedural protections for Union members upon whom a union is imposing sanctions. On cross motions for summary judgment the district court found that federal law preempted Colorado labor law, that there was no breach of the duty to fairly represent in negotiating the collective bargaining agreement, and that application of the sanction to seven voluntary strikers did not violate the Landrum-Griffin Act.[109] The trial court held, however, that application of the sanctions to three claimed involuntary strikers violated the protection of section 101(a)(5), and rejected the Union's motion for summary judgment as to these three plaintiffs.[110]

The Tenth Circuit upheld the trial court's determination on all issues except the holding in favor of the involuntary strikers.[111] The court recognized that the union's duty to fairly represent created no obligation to refrain from accepting a collective bargaining agreement not entirely

102. Note, however, that one reason Rule 301 rejected the "presumption-as-evidence" approach was the difficulty in determining the proper evidentiary weight to give a presumption. J. WEINSTEIN & M. BERGER, *supra* note 91, at 301-4 to 301-7.

103. 29 C.F.R. § 101.20(c) (1983).

104. 694 F.2d 1237 (10th Cir. 1982).

105. *Id.* at 1238.

106. *Id.* at 1237-38.

107. *Id.* at 1238.

108. 29 U.S.C. § 411(a)(5) (1982).

109. 694 F.2d at 1238.

110. *Id.*

111. *Id.* at 1239-40.

beneficial to its members.[112] Similarly, the court found there was no breach in the Union's operation of a hiring hall which, on balance, benefited Union members.[113] The preemption ruling was upheld without discussion.[114]

As noted, however, the court of appeals reversed the trial court's grant of summary judgment in favor of the three plaintiffs who claimed they had not willingly joined the strike.[115] The Tenth Circuit held that the benching had not affected the three plaintiffs' rights as union members, and that therefore the trial court incorrectly held that these plaintiffs had been wrongly denied the due process protections of the Landrum-Griffin Act.[116]

Section 101(a)(5) of the Landrum-Griffin Act provides:

> No member of any labor organization may be fired, suspended, expelled or *otherwise disciplined* except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.[117]

The plaintiffs had been afforded none of these procedural protections.[118] The trial court determined that benching fell within the "otherwise disciplined" language, and that therefore the plaintiffs' rights had been violated.[119] The Union argued on appeal that section 101(a)(5) was intended to protect workers only against union related disciplinary action, and that because the discipline imposed on the plaintiffs was not internal Union discipline, the Landrum-Griffin Act's procedural protections were inapplicable.[120] The court of appeals agreed[121] on the basis of the recent United States Supreme Court decision *Finnegan v. Leu*.[122]

In *Finnegan* the petitioners were Union members who were also employed as business agents by the Union.[123] Petitioners were fired by Leu, the Union's president, after he had won an election defeating Brown, the union's former president.[124] Leu felt that petitioners' open support of Brown during the election cast doubt on their ability to implement the policies and pro-

112. *Id.* at 1240.

113. *Id.*

114. *See id.* at 1238.

115. *Id.* at 1239.

116. *Id.* at 1239. The district court decision is unreported, but apparently the court ruled that protection of the Landrum-Griffin Act extended to unwilling participants in a wildcat strike, perhaps because of the opportunity the Act provides for a hearing before the imposition of a penalty. If the collective bargaining agreement contained a grievance procedure, the three unwilling participants in the strike could have filed a grievance against the employer for unfair discharge and had a hearing in that context. *See* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975).

117. 29 U.S.C. § 411(a)(5) (1976) (emphasis supplied).

118. 694 F.2d at 1238.

119. *Id.*

120. *Id.*

121. *Id.* at 1239.

122. 456 U.S. 431 (1982).

123. *Id.* at 434. As business agents, petitioners performed confidential, policymaking tasks for their local. *Id.*

124. *Id.* at 433-34.

grams of the new administration.[125] Leu's right to discharge business agents was granted by the Union's by-laws.[126]

Petitioners in *Finnegan* claimed protection from dismissal in section 609 of the Labor-Management Reporting and Disclosure Act of 1959[127] (Landrum-Griffin Act), which makes it unlawful for a union official "to fire, suspend, expel or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act."[128] Among the Landrum-Griffin Act's guarantees is the right "to express any views, arguments, or opinions."[129] The Supreme Court held that "the term 'discipline,' as used in section 609, refers only to retaliatory actions that affect a union member's rights or status *as a member* of the union" not as its employee.[130]

In construing section 609 the Supreme Court cited the "otherwise disciplined" language from section 101(a)(5)[131] and its accompanying conference report to lend force to the distinction it found between union action affecting a union member's rights as a member and action affecting his rights as an employee.[132] The intent of Congress in enacting these sections of the Landrum-Griffin Act was to protect union members against discipline arbitrarily denying members the rights incident to union membership.[133] Actions which did not affect those rights—such as loss of an employment position with the Union—were therefore not discipline within the meaning of section 609,[134] and, by implication, section 101(a)(5).

The Tenth Circuit found the analysis in *Leu* controlling in *Hackenburg*.[135] The court held that because the benching imposed by the Union did not affect the disciplined members' rights qua members, the employees were not disciplined within the meaning of section 101(a)(5). Hence, the procedural protections of that section were inapplicable, and the trial court had improperly granted summary judgment in favor of the involuntary strikers.[136]

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125. *Id.* at 434.
126. *Id.*
127. 29 U.S.C. § 529 (1982).
128. *Id.*
129. 29 U.S.C. § 102(a)(2) (1982).
130. 456 U.S. at 437 (emphasis in original).
131. *See supra* text accompanying note 116.
132. 456 U.S. at 436.
133. *Id.* at 438.
134. *Id.* at 439. *Finnegan* also analyzed whether the firing violated the petitioners' speech rights within the meaning of section 102 of the Act, 29 U.S.C. § 412 (1982), which provides an independent action for deprivations of rights secured by the Act. *Id.* This analysis does not affect the holding with respect to the scope of the "otherwise disciplined" language, as the two sections were intended to address different problems. *See* 456 U.S. at 439 & n.10.
135. 694 F.2d at 1239.
136. *Id.*

* Sections I & III. Section II was prepared by the Denver Law Journal Editors in conjunction with Ms. Lindsay.

# LANDS AND NATURAL RESOURCES

## OVERVIEW

The Tenth Circuit Court of Appeals decided a surprisingly small number of controversies involving lands and natural resources during the time period covered by the *Tenth Annual Tenth Circuit Survey*. The subject matter of the few land and resource decisions was also limited. Whereas in recent years the court has considered a wide variety of resource and land issues,[1] the past year is distinguished by its lack of variety. Of the eight land and resource decisions published by the court,[2] six concerned public lands,[3] one involved Indian lands,[4] and one resolved an environmental law question.[5] This survey will highlight the issues resolved in each of these cases.

## I. PUBLIC LANDS

### A. *Boundary Disputes*

In a routine application of established principles, the court resolved a boundary-line dispute concerning privately held lands bordering a national forest.[6] The interesting aspect of the case, however, is the court's announcement of an additional requirement for establishing estoppel against the government in boundary disputes involving federal land patents.

*Sweeten v. United States Department of Agriculture Forest Service*[7] was an action to quiet title to a parcel of land bordering a national forest. Although Sweeten believed the land to be hers, a Forest Service survey, which was based on a previous resurvey that reestablished a lost corner of the section encompassing Sweeten's land,[8] indicated Sweeten's fence encroached on national forest property.[9] After receiving notice of her alleged encroachment, Sweeten attempted to quiet title[10] by attempting to prove that the resurvey

1. *See Lands and Natural Resources, Ninth Annual Tenth Circuit Survey*, 60 DEN. L.J. 333 (1983); *Lands and Natural Resources, Eighth Annual Tenth Circuit Survey*, 59 DEN. L.J. 335 (1982); *Lands and Natural Resources, Seventh Annual Tenth Circuit Survey*, 58 DEN. L.J. 415 (1981).

2. This discussion of the number of land and resource decisions of the court does not include non-published opinions or cases based on diversity jurisdiction.

3. Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983); Stewart Capital Corp. v. Andrus, 701 F.2d 846 (10th Cir. 1983); Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982); City and County of Denver v. Bergland, 695 F.2d 465 (10th Cir. 1982); Ahrens v. Andrus, 690 F.2d 805 (10th Cir. 1982); Sweeten v. United States Dep't of Agriculture Forest Service, 684 F.2d 679 (10th Cir. 1982).

4. Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982).

5. Johnston v. Davis, 698 F.2d 1088 (10th Cir. 1983).

6. Sweeten v. United States Dep't of Agriculture Forest Service, 684 F.2d 679 (10th Cir. 1982).

7. *Id.*

8. Public lands have been divided on a rectangular grid system since 1785. P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 64-65 (1968). A section is a square land area containing 640 acres. 43 U.S.C. § 751 para. 3 (1976).

9. 684 F.2d at 680.

10. 28 U.S.C. § 2409a (1982) permits the United States to be joined as a defendant in quiet title actions involving lands in which the United States claims an interest.

impermissibly reduced the rights granted by her original patent,[11] and by arguing that the government was estopped to deny that her fence was the true property boundary.[12]

1. Validity of the Resurvey

The location of a disputed boundary is a question of fact.[13] The circuit court's review was therefore limited to a determination of whether the trial court's findings were clearly erroneous.[14] Because the trial court's determination that the resurvey established the true boundary was based on adequate evidence, this finding was upheld by the Tenth Circuit.[15]

Sweeten then argued that the resurvey was invalid as a matter of law because it impaired her ownership rights.[16] The patent to her land conveyed a specific amount of acreage described in metes and bounds.[17] Sweeten contended that the stated acreage reflected the true extent of her ownership rights, and that the resurveys were invalid because they reduced her total acreage.[18] The Tenth Circuit dismissed this argument, observing that a metes and bounds description was generally more persuasive evidence of the scope of a conveyance.[19] Because Sweeten's ownership rights were limited by the metes and bounds description, the Forest Service's accurate resurveys could not impair her ownership rights.[20]

2. Estoppel

The Tenth Circuit also denied Sweeten's claim that the government was estopped to deny that her fence was the boundary line.[21] In so doing the Tenth Circuit recognized that in addition to the four traditional elements of estoppel,[22] a fifth requirement must be established to estop the government in boundary disputes involving federal land patents.[23] The fifth

11. *See* 43 U.S.C. § 772 (1976). This statute provides in relevant part that "no . . . resurvey [of public lands] . . . shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey. . . ." *Id.*

12. 684 F.2d at 681.

13. *Id. Accord* United States v. State Inv. Co., 264 U.S. 206, 211 (1924); United States v. Doyle, 468 F.2d 633, 636 (10th Cir. 1972).

14. 684 F.2d at 681.

15. *Id.*

16. *Id. See supra* note 11.

17. 684 F.2d at 681 n.3.

18. *Id.* at 681-82.

19. *Id.* at 682 & n.4.

20. *Id.*

21. *Id.* at 682. Sweeten also argued that the fence was the basis for a finding of ownership through adverse possession or boundary by acquiescence. *Id.* The court summarily rejected these claims, noting that title to public lands cannot be acquired through doctrines designed to resolve private disputes. *Id.* (citing United States v. California, 332 U.S. 19, 39-40 (1947)).

22. The four traditional elements of estoppel are:

> 1) The party to be estopped must know the facts; 2) He must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; 3) The latter must be ignorant of the true facts; and 4) He must rely on the former's conduct to his injury.

684 F.2d at 682 n.5 (quoting United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979)).

23. 684 F.2d at 682.

element requires the party asserting estoppel to prove affirmative misconduct on the part of the government.[24] Because no affirmative misconduct was evident, Sweeten's estoppel claim was denied.[25]

Judge Barrett disagreed only with the majority's holding that a fifth element, affirmative misconduct, must be proved in order to estop the government in federal land patent boundary cases.[26] Judge Barrett stated the traditional elements of estoppel were sufficient in these cases and indicated that the flexibility of the traditional estoppel doctrine would better effect just and fair decisions.[27]

In summary, it is clear that the Tenth Circuit will hereafter require a showing of affirmative misconduct on behalf of the government in order to estop the government in boundary disputes involving federal land patents. The requirement of proving affirmative misconduct means the government will be estopped in only the most flagrant cases.

### B. *Construction of the Federal Land Policy and Management Act of 1976*

#### 1. Mineral Leasing in Wilderness Study Areas

In *Rocky Mountain Oil and Gas Association v. Watt*[28] (*RMOGA*) the Tenth Circuit construed the "grandfather clause" of section 603(c) of the Federal Land Policy and Management Act of 1976[29] (FLPMA) in order to determine whether the Department of Interior (Interior) interpretation of the section was reasonable.

*RMOGA* had its inception in a 1978 interpretation of section 603(c) is-

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24. *Id.* The additional requirement was first applied in United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979).

25. 684 F.2d at 682.

26. *Id.* at 682 (Barrett, J., concurring in part and dissenting in part).

27. *Id.* at 682-83. Judge Barrett also stated that in some circumstances compelling reasons of public policy might prevent recognition of estoppel against the government. *Id.* at 683. This emphasis echoes Judge McKay's dissent in Home Sav. & Loan Assoc. v. Nimmo, 695 F.2d 1251 (10th Cir. 1982) (McKay, J., dissenting), where Judge McKay views separation of powers concerns as a policy limitation on estopping the government. *Id.* at 1260-61.

28. 696 F.2d 734 (10th Cir. 1982).

29. 43 U.S.C. § 1782(c) (1976). Section 603(c) contains the congressionally mandated standards under which the Secretary of Interior (Secretary) is required to manage Bureau of Land Management (BLM) lands under review for designation as wilderness areas. The section states:

> During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: *Provided*, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 1714 of this title for reasons other than preservation of their wilderness character.

*Id.*

The "grandfather clause" is that portion of section 603(c) which states that the non-impairment management standard is "subject . . . to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976. . . ." *Id. See* 696 F.2d at 746-47.

sued by the Solicitor of the Department of Interior (Solicitor).[30] The Solicitor's opinion stated that all activities that were not protected by the section 603(c) grandfather clause[31] were to be regulated pursuant to the general nonimpairment standard provided in the section.[32] The opinion then interpreted the grandfather clause as applying only to actual, on-the-ground uses as they existed on the date of FLPMA's enactment.[33] Thus, any new uses or modifications in existing uses would only be permitted if the requested use would not impair an area's suitability for preservation as wilderness.[34]

The Solicitor's opinion, along with stringent Interior Department leasing guidelines promulgated following the opinion, resulted in an almost total cessation of mineral development in Wilderness Study Areas (WSA's).[35] The Rocky Mountain Oil and Gas Association challenged the Solicitor's interpretation of section 603(c) as being arbitrary and capricious and contrary to law, and requested declaratory and injunctive relief from Interior's application of the nonimpairment standard to mineral leasing within WSA's.[36] The district court granted the requested relief, holding that because section 603(c) unambiguously required active development of mineral leasing,[37] Interior's restrictive regulations were an invalid exercise of administrative authority.[38]

On appeal, the Tenth Circuit reversed the district court and upheld the regulations that were based on the Solicitor's opinion.[39] After a preliminary discussion of the overall policy and purpose of FLPMA,[40] the Tenth Circuit examined the district court's interpretation of section 603(c). The Tenth Circuit disagreed with the district court's characterization of section 603(c) as unambiguous and therefore delved into the section's legislative history to determine which mineral lease activities the grandfather clause exempted

30. 86 Interior Dec. 91 (1978) (formal opinion).

31. *See supra* note 29.

32. 86 Interior Dec. at 99-109. *See supra* note 29.

33. *Id.* at 111-15.

34. *Id.* at 111-12 (interpreting section 603(c)'s grandfather exception for "existing mining and grazing uses" to apply only to activities actually taking place on FLPMA's effective date); *id.* at 114-15 (interpreting section 603(c)'s grandfather exception for "existing mineral leasing" to apply only to lease development activities actually taking place on FLPMA's effective date).

35. Rocky Mountain Oil & Gas Ass'n v. Andrus, 500 F. Supp. 1338, 1342 (D. Wyo. 1980), *rev'd sub nom.* Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982). Wilderness Study Areas (WSA's) are lands which have been identified as roadless areas of 5,000 acres or more, or roadless islands. *See* 43 U.S.C. § 1782(a) (1976). Once designated as a WSA an area is evaluated to determine whether it should be designated as a wilderness area under the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136 (1982). *See* 43 U.S.C. § 1781(a) (1976). Section 603(c), codified at 43 U.S.C. § 1782(c) (1976), is designed to protect the WSA's while they are evaluated for designation as a wilderness area.

36. Rocky Mountain Oil & Gas Ass'n v. Andrus, 500 F. Supp. 1338, 1342 (D. Wyo. 1980), *rev'd sub nom.* Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982).

37. 500 F. Supp. at 1344-45.

38. *Id.* at 1344.

39. Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734, 750 (10th Cir. 1982).

40. *Id.* at 738-39. The court ruled on two jurisdictional issues prior to discussing the merits of the case. First, the court held that the case was ripe for decision because the solicitor's opinion was final agency action resulting in significant, ongoing financial harm to RMOGA's members. *Id.* at 741-42. Second, the court held that RMOGA was not required to exhaust administrative remedies because the merits of the case involved a question of statutory interpretation previously ruled on by the agency. *Id.* at 743-44.

from application of the nonimpairment standard. Based on its interpretation of congressional intent, the court ruled that section 603(c)'s grandfather clause exempted mineral lease development in WSA's only "in the manner and degree actually occurring on October 21, 1976."[41] Interior's policy of subjecting new or changed mineral lease activity to the nonimpairment standard was therefore upheld.[42]

As a result of *RMOGA*, additional mineral leasing development will not—as a practical matter—take place in WSA's. The opinion in effect interprets section 603(c) as permitting stricter land management standards for WSA's than those provided for lands designated as Wilderness Areas, where mineral development was allowed through 1984.[43] *RMOGA* therefore interprets FLPMA to require less mineral development in potential Wilderness Areas than was allowed in existing Wilderness Areas.

2. Cost Reimbursement for Right-of-Way Applications

A Department of Interior (Interior) cost reimbursement regulation promulgated under the authority of FLPMA was the subject of a challenge in the consolidated case of *Nevada Power Co. v. Watt*.[44] The regulation at issue required an applicant for a right-of-way over federal lands to reimburse the government for administrative and other costs incurred in processing the application.[45] The regulation, on its face, is not contrary to the FLPMA provisions that authorize the Secretary to require reimbursement of reasonable costs associated with the application process.[46] By Secretarial Order,

41. *Id.* at 750.

42. *Id.* Activity exempt from the nonimpairment standard remains subject to reasonable environmental protection regulations. *See* 43 U.S.C. § 1782(c) (1976).

43. *See* 16 U.S.C. § 1133(d)(3) (1982).

44. 711 F.2d 913 (10th Cir. 1983).

45. The challenged regulation provided:

> An applicant for a right-of-way grant or a temporary use permit shall reimburse the United States for administrative and other costs incurred by the United States in processing the application, including the preparation of reports and statements pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. §§ 4321-4347), before the right-of-way grant or temporary use permit shall be issued under the regulations of this title.

43 C.F.R. § 2803.1-1(a) (1983).

46. Two FLPMA provisions authorize the Secretary to collect the reasonable costs associated with processing applications from right-of-way applicants. Section 504(g) provides:

> The Secretary . . . may, by regulation or prior to promulgation of such regulations, as a condition of a right-of-way, require an applicant for or holder of a right-of-way to reimburse the United States for all reasonable administrative and other costs incurred in processing an application for such right-of-way and in inspection and monitoring of construction, operation, and termination of the facility pursuant to such right-of-way. . . .

43 U.S.C. § 1764(g) (1976).

Section 304 provides:

> (a) Notwithstanding any other provision of law, the Secretary may establish reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents relating to the public lands and may change and abolish such fees, charges, and commissions.
>
> (b) The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such lands. . . . As used in this section 'reasonable costs' include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any

however, the "reasonable costs" language of FLPMA and the "administrative and other costs" language of the regulation were defined to mean "actual costs".[47] As a result of this interpretation, right-of-way applicants were being charged the full, actual costs of processing their applications.[48] *Nevada Power* involved several power company challenges to the practice of requiring reimbursement of actual costs incurred in processing electric transmission line right-of-way applications.[49]

In *Nevada Power* each utility alleged that FLPMA required the Bureau of Land Management (BLM) to consider specifically the factors listed in section 304(b) of FLPMA[50] when establishing its reasonable reimbursement costs, and that BLM had breached this statutory duty.[51] The utilities also argued that BLM could not, as a matter of law, require reimbursement for the entire cost of any environmental impact statement (EIS) required by a right-of-way application.[52] BLM, conversely, insisted that application of the reasonableness factors was purely discretionary, and that its regulations were therefore valid even absent consideration of the statutory factors.[53] Similarly, they insisted that the full cost of an EIS could be included in the reimbursement charges.[54]

In resolving this conflict, the Tenth Circuit carefully examined the legislative history of section 304(b).[55] That examination indicated that Congress had included the specific factors in section 304(b) to prevent Interior from routinely assessing the full cost of an application.[56] Essentially, Congress included the reasonableness factors in the statute to guide the Secretary in his determination of reasonable costs; the Secretary, therefore, was required to consider the factors in determining how much of the actual cost would be charged to the applicant.[57] Because the reimbursement regulation had not been promulgated after consideration of the statutorily mandated reasona-

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authorized facility; or other special activities. In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency to the government processing involved, that portion of the cost incurred for the benefit of the general public interest rather than for the exclusive benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs.

43 U.S.C. § 1734 (1976).

47. The Secretarial Order stated in pertinent part:

*It is my finding that "reasonable costs" under Sections [sic] 304* of FLPMA for processing applications for rights-of-way over public lands and for monitoring right-of-way holder activity, *are the actual costs incurred* by the United States in performing statutory responsibilities necessitated by such applications or rights-of-way. The term "reasonable costs" means the same as the term "administrative and other costs" as used in the regulations . . . and includes costs incurred in preparation of environmental impact statements.

Secretarial Order No. 3011, 42 Fed. Reg. 55,280 (1977) (emphasis added).

48. Nevada Power Co. v. Watt, 711 F.2d 913, 916 (10th Cir. 1983).

49. *Id.* at 918-19.

50. 43 U.S.C. § 1734(b) (1976). *See supra* note 46.

51. 711 F.2d at 919.

52. *Id.* at 929.

53. *Id.* at 919.

54. *See id.* at 918, 929.

55. *Id.* at 921-25.

56. *Id.* at 924.

57. *Id.* at 925.

bleness factors, the court held that the regulation was invalid.[58]

The Tenth Circuit also held that Interior could not charge the full cost of an EIS to right-of-way applicants.[59] The benefit of a required EIS inured partially to the applicant and partially to the general public.[60] Thus, because the statutory requirement to assess only reasonable costs required consideration of the public benefits accruing from bestowing a private benefit,[61] the full cost of an EIS could not be charged to the applicant.[62]

In summary, the *Nevada Power* decision mandates that Interior consider the statutorily enumerated reasonableness factors when calculating the costs that will be passed on to a right-of-way applicant. Consideration of these factors will usually result in payment of less than full reimbursement costs by the applicant.[63] In any case, the right-of-way applicant benefits because Interior cannot assess that portion of the cost of an EIS which results in general public benefit.[64]

### C. *Oil and Gas Leasing Regulations*

The court decided two narrow questions concerning a BLM interpretation of regulations controlling simultaneous filings for noncompetitive oil and gas leases. These regulations set forth the specific procedural and substantive requirements for filing a valid simultaneous lease application.[65] In *Ahrens v. Andrus*,[66] the Tenth Circuit rejected a BLM ruling requiring that the date of execution be shown for each separate signature on a lease application (also known as a lease drawing entry card or DEC).[67]

Because the Ahrens DEC's did not have dated signatures, the BLM rejected the applications and issued the leases to the next qualified parties.[68] In overturning the BLM decision, the court reasoned that a signature date requirement served no important purpose because the only significant date for BLM purposes was the filing date of the DEC.[69] The court therefore followed a prior Tenth Circuit opinion[70] which held that denying an applica-

58. *Id.* at 926-27. The court noted, however, that in some instances, consideration of the statutory factors might result in a determination that actual cost reimbursement was reasonable. *Id.* at 925 n.6.

59. *Id.* at 928-29.

60. *Id.* at 928 (citing Alumet v. Andrus, 607 F.2d 911 (10th Cir. 1979)).

61. 711 F.2d at 930. *See supra* note 46.

62. The court rejected the utilities' argument that assessing the full cost of the benefit would be an unconstitutional exercise of the taxing power. *Id.* at 929-30. Because the EIS cost was a necessary part of granting a special benefit to the utilities, the agency could constitutionally require full reimbursement. *Id.* at 930 (citing Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980)).

63. *See supra* note 58.

64. *See supra* notes 59-62 and accompanying text.

65. See 43 C.F.R. § 3112 (1983). The applications are referred to as "simultaneous filings" because each application is for lease of both oil and gas rights. *See id.* § 3112.2-1.

66. 690 F.2d 805 (10th Cir. 1982).

67. *Id.* at 808.

68. *Id.* at 806.

69. *Id.* at 808.

70. Winkler v. Andrus, 594 F.2d 775 (10th Cir. 1979).

tion based on inconsequential defects in the application was inappropriate,[71] and ruled that the Ahrens applications should not have been denied.[72]

The second case concerning the simultaneous oil and gas leasing regulations also concerned the adequacy of a DEC. In *Stewart Capital Corp. v. Andrus*,[73] the DEC's submitted by Stewart on behalf of its clients did not contain a statement of agency required by existing regulations.[74] For this reason the leases were denied in spite of the fact that Stewart had submitted, and BLM had accepted, applications without the agency statement for over six years.[75] The BLM's reversal of its policy was based on the retroactive application of the administrative case *D.E. Pack*,[76] which ruled that DEC's filed without the required agency statement were invalid.[77]

In affirming the trial court's refusal to permit retroactive application of *Pack* to the leases submitted by Stewart,[78] the Tenth Circuit applied the well-recognized balancing test set forth in *Retail, Wholesale, and Department Store Union v. NLRB*.[79] After weighing the balancing standards[80] in light of Stewart's good-faith reliance on prior BLM practices, and in addition considering prior case law denying retroactive application of *Pack*,[81] the Tenth Circuit concluded that the Interior Department had abused its discretion in retroactively applying *Pack* to the Stewart DEC's.[82]

### D. *Construction of Right-of-Way*

*City and County of Denver v. Bergland*[83] adds one more chapter to the never-ending saga that details Denver's attempts to construct the Williams Fork

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71. *Id.* at 778.
72. 690 F.2d at 808.
73. 701 F.2d 846 (10th Cir. 1983).
74. *Id.* at 846. Stewart had failed to comply with 43 C.F.R. § 3102.6-1(a)(2) (1981) (amended 45 Fed. Reg. 8545 (1982) (codified at 43 C.F.R. § 3102.4 (1983)). 43 C.F.R. § 3102.6-1(a)(2) stated:

> If the offer is signed by an attorney-in-fact or agent, it shall be accompanied by separate statements over the signature of the attorney-in-fact or agent and the offeror stating whether or not there is any agreement or understanding between them or with any other person, either oral or written, by which the attorney in fact or agent or such other person has received or is to receive any interest in the lease when issued.

*Id.*
75. 701 F.2d at 848.
76. 84 Interior Dec. 192 (1977), *aff'd on reconsideration*, 85 Interior Dec. 408 (1978).
77. 84 Interior Dec. at 196.
78. 701 F.2d at 850.
79. 466 F.2d 380 (D.C. Cir. 1972). *See* 701 F.2d at 848.
80. The standards set forth in *Retail, Wholesale, and Dep't Store Union* are:
1. [W]hether the particular case is one of first impression;
2. [W]hether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law;
3. [T]he extent to which the party against whom the new rule is applied relied on the former rule;
4. [T]he degree of the burden which a retroactive order imposes on a party; and
5. [T]he statutory interest in applying a new rule despite the reliance of a party on the old standard.

466 F.2d at 390.
81. *E.g.*, McDonald v. Watt, 653 F.2d 1035 (5th Cir. 1981); Runnells v. Andrus, 484 F. Supp. 1234 (D. Utah 1980).
82. 701 F.2d at 850.
83. 695 F.2d 465 (10th Cir. 1982).

Diversion Project.[84] The case involved a right-of-way across United States Forest Service (USFS) lands granted for water diversion canals that are a part of the Williams Fork Project. Although the court detailed the complete history of the right-of-way,[85] the basic question addressed was whether the USFS was authorized to order Denver to discontinue construction on the right-of-way in light of Denver's deviation from the right-of-way originally granted.[86]

In order to determine USFS authority over Denver's right-of-way, the court began by defining the nature and scope of the Denver right-of-way. The Denver right-of-way was granted in 1924 pursuant to section 4 of the Act of February 1, 1905.[87] Under this Act the Secretary of Interior (Secretary) was charged with administering the Denver right-of-way.[88] Although FLPMA both transferred authority to the USFS to administer rights-of-way across national forest land[89] and eliminated the Secretary's authority to "grant, issue, or renew" rights-of-way over national forest lands,[90] the court held that FLPMA did not affect the Secretary's exclusive jurisdiction over existing rights-of-way issued under the Act of February 1, 1905.[91] Thus, FLPMA did not grant USFS authority over Denver's right-of-way.[92]

The USFS also attempted to rely on the Act of June 4, 1897[93] as authority for the stop order issued to Denver. The USFS argued that the Act authorized them to prevent unauthorized construction in order to preserve national forests from destruction, and that Denver's deviation from the right-of-way constituted unauthorized construction.[94] The Tenth Circuit

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84. The Tenth Circuit's detailed history of the Williams Fork project reveals that the project has been under construction since the late 1930's. *See id.* at 469.

85. *Id.* at 467-71.

86. *See id.* at 474, 476-77.

87. 16 U.S.C. § 524 (1982), *partially repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (codified at 43 U.S.C. § 1701 (1976)). *See* 695 F.2d at 468. Section 4 of the Act of February 1, 1905 provides:

> Rights-of-way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the national forests of the United States, are granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said forests are respectively situated.

16 U.S.C. § 524 (1982).

88. 695 F.2d at 468, 475.

89. 43 U.S.C. § 1761(a) (1976).

90. *See* 43 U.S.C. § 1770(a) (1976).

91. 695 F.2d at 475-76. The court reasoned that because FLPMA expressly stated that it should not be deemed to work repeals by implication, Pub. L. No. 94-579 § 701(f); 90 Stat. 2743, 2786 (1976), revocation of the Secretary's authority to "grant, issue, or renew" rights-of-way did not divest the Secretary of authority to administer existing rights-of-way. 695 F.2d at 475-76.

92. 695 F.2d at 476.

93. 16 U.S.C. § 551 (1982). The statute provides in pertinent part:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests . . . and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction . . . .

*Id.*

94. 695 F.2d at 476. The USFS also argued that Denver's use of steel culverts constituted

recognized that, in the absence of the Secretary's authority under the Act of February 1, 1905, the USFS had the power to issue an order halting construction deviating from a right-of-way.[95] The court found, however, that Denver's deviation implicated the Secretary's exclusive authority to administer Denver's right-of-way.[96] Therefore, USFS had no power to issue its stop order.[97] The court then held that Denver could not continue construction of the project along a path deviating from its original right-of-way without obtaining permission from BLM.[98]

The result of the *City and County of Denver v. Bergland* decision is that the BLM, and not the USFS, has sole authority over administration of the Denver right-of-way. The case did not, however, resolve all the issues raised by Denver. Considering that the court left to BLM the determination of the extent to which the National Environmental Protection Act of 1969[99] applies to the Williams Fork Diversion Project, this long-running saga may again appear in federal court.

## II. ENVIRONMENTAL LAW

### A. *Interpretation and Adequacy of an Environmental Impact Statement*

The National Environmental Policy Act of 1969[100] (NEPA) requires the preparation of an environmental impact statement (EIS) to accompany "every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment."[101] In effect, NEPA requires federal agencies to consider the environmental consequences of their actions prior to undertaking certain projects. Determining when NEPA applies[102] and the adequacy of federal compliance with the EIS requirements[103] has led to widespread litigation.[104] During the survey period the Tenth Circuit, in *Johnston v. Davis*,[105] further refined the judicial interpretation of what constitutes an adequate EIS.

*Johnston* considered the adequacy of the final EIS[106] the Soil Conservation Service (SCS) prepared in conjunction with the Toltec Reservoir Project.[107] Plaintiffs alleged that the Toltec Reservoir Project EIS failed to

unauthorized construction because the original right-of-way permit was limited to construction of canals. *Id.* at 478. The Tenth Circuit agreed that USFS could halt this practice if it was indeed unauthorized, but found that USFS administrative practice justified treating the use of steel culverts as authorized by the right-of-way grant. *Id.* at 478-79.

95. *Id.* at 480.

96. *Id.*

97. *Id.* at 480-81.

98. *Id.* at 481. BLM exercises the Secretary's authority over rights-of-way.

99. 42 U.S.C. §§ 4321-4347 (1976 & Supp. V 1981).

100. 42 U.S.C. §§ 4321-4347 (1976 & Supp. V 1981).

101. 42 U.S.C. § 4332(2)(C) (1976).

102. For a discussion of when NEPA is applicable to federal agency action, see F. ANDERSON, NEPA IN THE COURTS 56-141 (1973).

103. For a discussion of the required contents of an EIS, see *id.* at 179-245.

104. For a partial list of cases interpreting NEPA, see *id.* at 298-307.

105. 698 F.2d 1088 (10th Cir. 1983).

106. USDA-SCS-EIS-WS-(ADM)-79-1-F-WY (January 1980).

107. The Toltec Reservoir Project was authorized pursuant to the Watershed Protection and Flood Prevention Act, 16 U.S.C. §§ 1001-1008 (1982). 698 F.2d at 1090 n.1.

consider certain environmental costs[108] and applied an unrealistic discount rate in preparing the required economic evaluation of the project.[109] The Tenth Circuit quickly dismissed Johnston's claim that the EIS inadequately discussed the issues mandated by NEPA.[110] The court held, however, that the EIS was inadequate not because an artificially low discount rate had been used, but because SCS had used that rate to improperly represent an unrealistic economic value for the project.[111]

The SCS used a 3.2% discount rate to calculate the present value of the Toltec Reservoir Project, pursuant to a congressional mandate that required an artificial discount rate to be used to evaluate all water resource projects authorized prior to 1970.[112] Congress mandated this artificial standard in order to permit construction of certain projects despite their economic inefficiency.[113] The Tenth Circuit recognized that the SCS was obligated to use an artificially low discount rate when comparing alternatives to the Toltec Reservoir Project.[114] The court concluded, however, that the mandated use of an artificial discount rate did not authorize the SCS to represent in the EIS that the Toltec Reservoir Project would yield positive economic benefits.[115] Failure to mention the use of the artificial rate rendered the EIS misleading because the document would not reflect a reasonable comparison of alternatives to the proposed project.[116] The court therefore required SCS to include a discussion of the artificial discount rate in the Toltec Reservoir Project EIS.[117] The court also held that the EIS must include an economic evaluation of the project using a realistic discount rate.[118]

## III. INDIAN LANDS

### A. *Oil and Gas Leases*

The Tenth Circuit opinion in *Jicarilla Apache Tribe v. Andrus*[119] discussed the remedies available to an Indian tribe when the Bureau of Indian Affairs

108. 698 F.2d at 1091-92.

109. *Id.* at 1092. NEPA requires an assessment of a project's projected economic benefits in order to contrast the project's value with the value of alternative actions. *Id. See* 42 U.S.C. § 4332(2)(C)(iii) (1976).

110. 698 F.2d at 1091-92. NEPA requires that an EIS address the following issues:

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C) (1976).

111. 698 F.2d at 1094-95.

112. See 42 U.S.C. § 1962d-17 (1976 & Supp. V 1981).

113. 698 F.2d at 1092.

114. *Id.* at 1094.

115. *See id.* at 1095.

116. *Id.*

117. *Id.*

118. *Id.*

119. 687 F.2d 1324 (10th Cir. 1982).

(BIA) failed to comply with the regulation[120] governing notice of oil and gas lease sales on Indian reservations.[121] Although the Jicarilla Apache Tribe (Tribe) requested cancellation of the leases based on BIA's noncompliance with the regulation,[122] the Tenth Circuit upheld the district court's determination that the equitable remedy of cancellation was unavailable.[123] Cancellation was denied because the extensive exploration and development activities on the leases made it impossible to return all the parties to the prelease status quo.[124] Given the impossibility of granting the requested equitable relief, the Tenth Circuit upheld the district court's award of compensatory damages.[125]

The Tenth Circuit also addressed the propriety of the district court order tolling both the primary lease term and the lessee's payment obligations during the pendency of the litigation.[126] Although the circuit court agreed that application of the tolling remedy was appropriate,[127] the circuit court reversed the district court's ruling that the lessee was excused from paying rentals during the pendency of the litigation.[128] One party to a lease will ultimately suffer the loss resulting from the delay in enjoying lease rights caused by litigation; the Tenth Circuit determined that the equities required payment of rent by the lessees.[129]

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120. The regulation in question provided that:

(a) At such times and in such manner as he may deem appropriate, after being authorized by the tribal council or other authorized representative of the tribe, the superintendent *shall publish notices at least thirty days prior to the sale*, unless a shorter period is authorized by the Commissioner of Indian Affairs, that oil and gas leases on specific tracts, each of which shall be in a reasonably compact body, will be offered to the highest responsible bidder for a bonus consideration, in addition to stipulated rentals and royalties. . . .

(b) All notices or advertisements of sales of oil and gas leases shall reserve to the Secretary of the Interior the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing, and that if no satisfactory bid is received, or if the accepted bidder fails to complete the lease, or if the Secretary of the Interior shall determine that it is unwise in the interests of the Indians to accept the highest bid, the Secretary may readvertise such lease for sale, or if deemed advisable, with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations. The successful bidder or bidders will be required to pay his or their share of the advertising costs. . . .

25 C.F.R. § 171.3 (1981) (redesignated as 25 C.F.R. § 211.3 (1983)) (emphasis supplied).

121. Both the district court and the court of appeals concluded that Interior's failure to publish a notice describing the specific tracts, stating the stipulated rentals and royalties, and reserving the right to reject all bids constituted a failure to comply with the regulations. 687 F.2d at 1331-32.

122. The Tribe also asserted that the leases should be cancelled because BIA failed to prepare an EIS pursuant to NEPA. *Id.* at 1337. The court rejected this claim, however, based on the Tribe's unreasonable delay in bringing the claim and the Tribe's lack of good faith motivation in asserting the claim. *Id.* at 1338-40.

123. *Id.* at 1333.

124. *Id.* at 1333-34.

125. *Id.* at 1334.

126. *See id.* at 1340-42.

127. *Id.* at 1342.

128. *Id.* at 1343.

129. *Id.* at 1342-43.

# SECURITIES

## OVERVIEW

During the recent survey period, the Tenth Circuit Court of Appeals decided three cases[1] involving either the Securities Act of 1933[2] (1933 Act) or the Securities and Exchange Commission Act of 1934[3] (1934 Act). A fourth case, *Chandler v. KEW, Inc.*,[4] was ordered published during the survey period and is discussed in this section.

*Chandler*'s publication reinforced the Tenth Circuit's leading position in the ongoing debate over whether the sale of 100% of the stock in a corporation is a securities transaction within the purview of federal securities laws.[5] In a similar case, *Hackford v. First Security Bank*,[6] the court refused to treat an instrument's denomination as "stock" as the controlling factor in deciding whether the securities laws applied to a transaction.[7] *Zobrist v. Coal-X, Inc.*[8] examined the scope of an investor's duty of diligence when purchasing a security.[9] The fourth case, *Baum v. Great Western Cities, Inc.*,[10] merely upheld a jury's finding that plaintiffs had failed to prove the scienter required to establish a violation of rule 10b-5.[11] *Baum*, because of its limited precedential importance, will not be discussed in this survey.

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1. Zobrist v. Coal-X, Inc., 708 F.2d 1511 (10th Cir. 1983); Baum v. Great Western Cities, Inc., 703 F.2d 1197 (10th Cir. 1983); Hackford v. First Sec. Bank, No. 81-1863 (10th Cir. Jan. 31, 1983).

2. 15 U.S.C. §§ 77a-77aa (1982).

3. 15 U.S.C. §§ 78a-78kk (1982).

4. 691 F.2d 443 (10th Cir. 1977) (ordered published Oct. 18, 1982).

5. *Compare, e.g.*, Canfield v. Rapp & Son, Inc., 654 F.2d 459 (7th Cir. 1981); Fredericksen v. Poloway, 637 F.2d 1147 (7th Cir.), *cert. denied*, 451 U.S. 1017 (1981) (holding that the sale of 100% of the stock in a corporation is not a securities transaction) *with* Seagrave Corp. v. Vista Resources, Inc., 696 F.2d 227 (2d Cir. 1982); Golden v. Garafolo, 678 F.2d 1139 (2d Cir. 1982) (holding that such transactions fall within the purview of the securities laws). *See also* Dillport, *Restoring Balance to the Definition of Security*, 10 SEC. REG. L.J. 99 (1982); Seldin, *When Stock Is Not a Security: The "Sale of Business Doctrine" under the Federal Security Laws*, 37 BUS. LAW. 637 (1981); Thompson, *The Shrinking Definition of a Security: Why Purchasing All of a Company's Stock Is Not a Federal Security Transaction*, 57 N.Y.U. L. REV. 225 (1982); Note, *Securities Law*, 65 MARQ. L. REV. 487 (1982).

6. No. 81-1863 (10th Cir. Jan. 31, 1983).

7. *See infra* notes 40-67 and accompanying text.

8. 708 F.2d 1511 (10th Cir. 1983).

9. *See infra* notes 67-102 and accompanying text.

10. 703 F.2d 1197 (10th Cir. 1983).

11. *Id.* at 1206, 1210-11. Rule 10b-5, an anti-fraud rule promulgated under section 10b of the Securities and Exchange Commission Act of 1934, 15 U.S.C. § 78j(b)(1982), is codified at 17 C.F.R. § 240.10b-5 (1983). The Supreme Court has held that proof of some degree of scienter is necessary to establish a violation of rule 10b-5 when plaintiffs seek money damages under the rule, Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), but has not ruled on whether proof of reckless behavior satisfies the scienter requirement. *Id.* at 194 n.12. *Accord* Aaron v. SEC, 446 U.S. 680, 686 n.5 (1980). The Tenth Circuit holds the scienter element established upon proof of reckless behavior. Hackbart v. Holmes, 675 F.2d 1114 (10th Cir. 1982). *Hackbart* is discussed in last year's Tenth Circuit Survey. *See Securities, Ninth Annual Tenth Circuit Survey*, 60 DEN. L.J. 373, 373-80 (1982).

## I. *CHANDLER V. KEW, INC:* THE SALE OF BUSINESS DOCTRINE

### A. *The Case*

Chandler charged defendant KEW, Inc. with securities fraud in the sale of a liquor business.[12] Chandler contended that because the sales contract for the liquor store included 100% of defendant's outstanding corporate stock, and because "stock" was defined as a security by the 1933 and 1934 Acts,[13] the transaction was subject to federal securities laws.[14] The trial court rejected plaintiff's argument, and dismissed Chandler's claim for lack of subject-matter jurisdiction.[15] In a tersely worded opinion, the Tenth Circuit affirmed the trial court and held that the sale of 100% of the stock in a liquor store as part of the sale of the business was not a securities transaction within the meaning of the 1933 and 1934 Acts.[16]

Relying on *United Housing Foundation, Inc. v. Forman*,[17] the court rejected plaintiff's argument that KEW's sale of stock in the liquor business should be considered a security transaction simply because the statutory definition of security included the word "stock."[18] The court viewed *Forman* as limiting the application of the federal securities laws to those transactions in which the "economic reality" involved an investment in the investment scheme of another.[19] The economic reality of Chandler's transaction was the sale of ownership of a business via transfer of stock, rather than the sale of stock qua security.[20] Hence, the transaction was not subject to federal securities laws.

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12. Chandler v. KEW, Inc., 691 F.2d 442, 443 (10th Cir. 1983).

13. The 1933 Act defines "security" in 15 U.S.C. § 77b(1) (1982). This section provides:

> [U]nless the context otherwise requires—(1) the term "security" means any note, *stock*, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

*Id.* (emphasis supplied).

The 1934 Act's definition of security is found in 15 U.S.C. § 78c(a)(10) (1982). This definition is almost identical to that found in the 1933 Act; the primary difference between the two definitions is the 1934 Act's exclusion of short-term notes. *Compare* 15 U.S.C. § 77b(1) (1982) *with* 15 U.S.C. § 78c(a)(10)(1982). The minor differences between the two Acts have been found to lack controlling significance. *See* Tcherepnin v. Knight, 389 U.S. 332, 342 (1967); Baurer v. Planning Group, Inc., 669 F.2d 770, 776 (D.C. Cir. 1981). *See also* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 556 n.7 (1979).

14. 691 F.2d at 443.

15. *Id.* Both the 1933 and 1934 Acts contain provisions for federal jurisdiction over suits asserting violations of those Acts. 15 U.S.C. § 77v(a)(1982)(1933 Act); 15 U.S.C. § 78aa(1982)(1934 Act). Lack of diverse citizenship between the parties precluded subject-matter jurisdiction once the federal securities claims were dismissed. 691 F.2d at 334.

16. 691 F.2d at 444.

17. 421 U.S. 837 (1975).

18. 691 F.2d at 443, *See supra* note 13.

19. *See* 691 F.2d at 443-44.

20. *Id.* at 444.

B. *The Sale of Business Doctrine*

*Chandler*, although published belatedly, was the first post-*Forman* appellate recognition of the sale of business doctrine.[21] This doctrine restricts the application of federal securities laws to those stock transfers which have the indicia of an investment in a security. Stock transfers which are in effect merely evidence of a commercial sale of property are, under this doctrine, beyond the scope of the 1933 and 1934 Acts.[22]

The source of this restriction on the protection of federal law is found in the Supreme Court opinions setting out the identifying characteristics of those investments constituting federal securities.[23] Lower courts applying the sale of business doctrine read the Court's classificatory opinions as mandating an inquiry into the economic reality of an alleged securities transaction regardless of the formal denomination of the instruments involved.[24] Only when that inquiry reveals the type of investment contemplated by the 1933 and 1934 Acts (33/34 Act investment)[25] will federal securities laws be applicable to a transaction.[26]

*Forman* is the Court's most recent delineation of the general characteristics of a 33/34 Act investment. Under *Forman*, application of the federal securities laws is justified whenever there is an investment of valuable consideration in an enterprise with the expectation that the enterprise will generate profits through the management of a promoter or other third party.[27] Thus, even though an instrument may be denominated "stock," it is not a 33/34 Act investment unless the transaction involving the instrument manifests the basic economic realities described immediately above.[28]

The sale of business doctrine is a specific example of how courts apply

21. Seldin, *supra* note 5, at 642.

22. Frederiksen v. Poloway, 643 F.2d 1147, 1150 (7th Cir.), *cert. denied*, 451 U.S. 1017 (1981). *Accord* Thompson, *supra* note 5, at 252. *See also* Dillport, *supra* note 5, at 114. *Cf.* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 348 (1943) (fact that reality of transaction was not commercial sale of leasehold interest supported finding that transaction involved a security).

23. *E.g.*, United Hous. Found., Inc. v. Forman, 421 U.S. 837 (1977); SEC v. W.J. Howey Co., 328 U.S. 293 (1946); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943).

24. *E.g.*, King v. Winkler, 673 F.2d 342 (11th Cir. 1982); Frederiksen v. Poloway, 643 F.2d 1147 (7th Cir.), *cert. denied*, 451 U.S. 1017 (1981); Chandler v. KEW, Inc., 691 F.2d 443 (10th Cir. 1977).

25. The phrase "33/34 Act investment" is used in lieu of the statutory phrase "security" in order to emphasize the judicial focus on the economic reality of a transaction rather than the transaction's formal characteristics.

26. *See, e.g.*, King v. Winkler, 673 F.2d 342 (11th Cir. 1982); Frederiksen v. Poloway, 643 F.2d 1147 (7th Cir.), *cert. denied*, 451 U.S. 1017 (1981).

27. *See* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 852 (1977). *Forman* left open an important question which has occupied the circuit courts since SEC v. W.J. Howey Co., 328 U.S. 293 (1943), the decision *Forman* relys on in articulating the factors distinguishing commercial transactions from securities transactions. *See* 421 U.S. at 852 (quoting SEC v. W.J. Howey Co., 328 U.S. 293, 301 (1943)). *Howey* required an expectation of profits *solely* from the efforts of others. 388 U.S. at 301. *Forman* noted that the Ninth Circuit, in SEC v. Glenn W. Turner Enters., Inc., 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973), had held that a security was present even though profits were partially dependent on the investors' efforts. 421 U.S. at 852 n.16 (citing *Turner*, 474 F.2d at 482). The Court, however, refrained from commenting on the *Turner* holding. 421 U.S. at 852 n.16. *But see* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 560 n.12 (1979) (stating that the required investment may be in form of services, citing *Forman*'s recognition of *Turner*).

28. *Forman*, 421 U.S. at 848, 850-51.

*Forman*'s economic realities concept to evaluate a class of investment transactions. Typically, courts applying the doctrine find that the transfer of 100% of a business' stock divests the seller of management prerogative, thereby precluding application of the federal securities laws.[29] Thus, although the purchase of a business may be an investment in the conventional sense, it is not an investment entitled to the protection of the 1933 and 1934 Acts.

Not all circuits accept the sale of business doctrine, however. Those courts which reject the doctrine do not read *Forman* to establish the economic reality inquiry as the sole determinant of a statutory security.[30] According to these courts, the federal securities laws are applicable when a transaction involves *either* instruments having the characteristics normally associated with that type of instrument[31] *or* when the transaction has the economic reality of a 33/34 Act investment.[32] These courts read *Forman* as containing two holdings: first, the instruments involved lacked the normal attributes of stock and therefore were not securities, and second, the instruments involved were not securities as a matter of economic reality.[33] Both types of purchasers are entitled to federal protection, the latter because Congress intended to protect the unwary and the former because purchasers of instruments commonly understood to be securities are entitled to rely on the protection of federal securities laws.[34]

Regardless of the merits of reading *Forman* to establish two standards for identifying securities within the meaning of the 1933 and 1934 Acts,[35] *Chandler* and *Christy v. Cambron*,[36] another recent Tenth Circuit decision,[37] clearly establish that the economic reality test is the sole relevant inquiry in the Tenth Circuit. Thus, unless the purchaser of a business can establish that

29. *E.g.* King v. Winkler, 673 F.2d 342 (11th Cir. 1982); Canfield v. Rapp & Son, Inc., 654 F.2d 459 (7th Cir. 1981).

30. *See, e.g.*, Golden v. Garafolo, 678 F.2d 1139, 1144 (2d Cir. 1982); Mifflin Energy Resources, Inc. v. Brooks, 501 F. Supp. 334 (W.D. Pa. 1980); Titsch Printing, Inc., v. Hastings, 456 F. Supp. 445 (D. Colo. 1978); Bronstein v. Bronstein, 407 F. Supp. 925 (E.D. Pa. 1976).

31. For example, an instrument will be considered stock within the meaning of the 1933 and 1934 Acts when it entitles the owner to dividends, can be hypothecated, and bears other indicia traditionally associated with instruments denominated "stock." *See Golden*, 678 F.2d at 1144; *Mifflin Energy Resources*, 501 F. Supp. at 336; *Titsch Printing, Inc.*, 456 F. Supp. at 449; *Bronstein*, 407 F. Supp. at 929-30.

32. *See Golden*, 678 F.2d at 1144; *Titsch Printing, Inc.*, 456 F. Supp. at 449.

33. *E.g., Golden*, 678 F.2d at 1144; *Titsch Printing, Inc.*, 456 F. Supp. at 449. *Accord* Dillport, *supra* note 5, at 115. *But see* Thompson, *supra* note 5, at 246-50 (*Forman* requires analysis of nature of underlying transaction to determine applicability of federal securities laws regardless of the formal characteristics of a transferred instrument).

34. *Mifflin Energy Sources, Inc.*, 501 F. Supp. at 336; *Titsch Printing Co.*, 501 F. Supp. at 449. *Golden* also rejects limiting federal protection to instruments satisfying the economic reality test, but on a different basis than *Mifflin* and *Titsch*. *Golden* reasoned that the careful statutory list of covered instruments, *see supra* note 13, would have been superfluous had Congress intended to adopt only the economic reality test. 698 F.2d at 1144-45. Further, to adopt the economic reality test as exclusive would create uncertainty in the application of the Act, thereby undermining its prophylactic effect. *See id.* at 1146.

35. *Compare* Thompson, *supra* note 5, at 246-50 (rejecting dual standards) *with* Dillport, *supra* note 5, at 114-16 (supporting dual standards).

36. 710 F.2d 669 (10th Cir. 1983).

37. *Christy* was decided after the close of the survey period, and is therefore not discussed in this section.

the seller has retained control over management of the business,[38] in all probability the buyer will be required to resort to state law remedies for fraud and misrepresentation.[39]

## II. GRAZING RIGHTS AS A FEDERAL SECURITY

During the survey period the Tenth Circuit Court of Appeals also relied on the economic reality inquiry to arrive at a decision concerning the nature of the instruments involved in *Hackford v. First Security Bank*.[40] The dispute in *Hackford* grew out of the distribution of Ute Indian reservation lands following execution of the Ute Indian Supervision Termination Act[41] (Termination Act). The Termination Act divided members of the Ute Tribe into two classifications: "full blood" (those who are at least one-half Ute Indian and more than one-half Indian ancestry);[42] and "mixed blood" (those who are part Ute Indian but who do not qualify as full bloods).[43] In accordance with the Termination Act, 490 mixed bloods received 172,000 acres of range land as part of their share of the partition of Ute tribal assets.[44] To facilitate the distribution, the mixed bloods formed two nonprofit corporations to maintain the rangelands.[45] Each mixed blood then surrendered his interest in the land for a share in each corporation.[46] Each share permitted a member to graze a specified number of cattle and sheep for a specified number of days each year.[47]

First Security Bank was designated as the transfer agent for the shares, and in addition was named by the Secretary of the Interior to act as trustee for assets owned by mixed blood incompetents and minors.[48] The full bloods, with permission of the Bureau of Indian Affairs, offered the mixed bloods, and the bank acting as trustee, $1100 per share for the range corporation stock.[49] The bank, in accordance with Department of Interior regula-

38. *See* Christy v. Cambron, 710 F.2d 669, 672 & n.1 (purchasers of less than 100% of shares not entitled to bring action under federal securities laws because their participation in venture precluded finding profits were derived from efforts of others). *But see* Crowley v. Montgomery Ward & Co., 570 F.2d 875, 877 (10th Cir. 1975) (security present where *essential* managerial efforts those of seller of investment) (citing SEC v. Glenn W. Turner Enters. Inc., 474 F.2d 476 (9th Cir.), *cert. denied*, 414 U.S. 821 (1973)).

39. *Forman* stated that the name given an instrument might lead a purchaser to rely on the protection of the federal securities laws, especially when the instrument "embodies some of the significant characteristics typically associated with the named instrument." 421 U.S. at 850-51. Theoretically, therefore, an investor might be entitled to federal protection even absent purchase of an "economically real" security. It should be noted, however, that the Seventh Circuit, which has adopted the sale of business doctrine, recently held that the purchaser of a business could not justifiably rely on federal security law protection because of the commercial nature of the purchase transaction. Canfield v. Rapp & Son, 654 F.2d 459, 466 n.7 (7th Cir. 1981).

40. No. 81-1863 (10th Cir. Jan. 31, 1983).

41. 25 U.S.C. §§ 677-677aa (1982).

42. *Id.* § 677a(b).

43. *Id.* § 677a(c).

44. Hackbart v. First Sec. Bank, No. 81-1863, slip op. at 2-3 (10th Cir. Jan. 31, 1983).

45. *Id.* at 3.

46. *Id.*

47. *Id.*

48. *Id.* at 4.

49. *Id.*

tions, offered the shares to the mixed bloods, the full bloods, and to the Ute Tribe as a whole for at least $1100 per share.[50] This offer was accepted by the full bloods.[51]

The plaintiffs in *Hackford* represented a class of mixed blood trust beneficiaries whose stock was sold to the full bloods.[52] Among other allegations,[53] the plaintiffs contended that the bank violated the antifraud provisions of rule 10b-5[54] and section 10b of the Securities and Exchange Commission Act of 1934.[55] The Tenth Circuit Court of Appeals, applying the economic reality analysis articulated in *SEC v. W.J. Howey Co.*,[56] rejected the plaintiffs' charge, ruling that the shares in the range corporations were not securities within the meaning of the 1934 Act.[57]

*Howey* defined a security transaction as an investment in a common enterprise with the expectation of profits to be derived solely from the efforts of others.[58] In *Hackford*, the Tenth Circuit ruled that the range corporation stock failed the expectation of profits branch of the *Howey* test for several reasons. First, the range corporation was organized as a nonprofit corporation under Utah law, precluding any reasonable expectation of distributions.[59] Second, the court found that any intent to capture any appreciation in stock value caused by corporate activities was incidental to the real purpose of the group, which was to facilitate grazing for its members.[60] Because the primary motivation in acquiring the shares was use of the tribal property, the mixed bloods lacked the necessary profit motivation.[61] Alternately, the lack of evidence that the corporation had been promoted as a source of profits precluded any finding of profit motivation by those mixed bloods not

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50. *Id.*

51. *Id.*

52. *Id.* at 5.

53. The plaintiffs also alleged the bank breached its fiduciary trust obligations by not maximizing the sale price of the range land. The trial court ruled that the bank had set an appropriate price; this finding was upheld by the Tenth Circuit. *Id.* at 11-12.

54. 29 C.F.R. § 240.10b-5 (1983). Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (1) to employ any device, scheme, or artifice to defraud,
>
> (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the sale of any security.

*Id.*

55. 15 U.S.C. § 78j(b) (1982).

56. 328 U.S. 293 (1943). The *Howey* analysis served as the basis of the *Forman* holding. *See supra* note 27.

57. No. 81-1863, slip op. at 9.

58. 328 U.S. at 301.

59. No. 81-1863, slip op. at 8. *See* UTAH CODE ANN. § 16-6-21 (1953) (incorporation under nonprofit corporation act limited to corporations not organized for pecuniary purposes).

60. No. 81-1863, slip op. at 8. *Cf.* Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036 (10th Cir. 1980) (recognizing expectation of capital appreciation satisfies *Howey* expectation of profits inquiry).

61. No. 81-1863, slip op. at 8 (citing United Hous. Found., Inc. v. Forman, 421 U.S. 837, 857 (1977)).

wishing to graze cattle.[62]

The court also ruled that the stock failed the third part of the *Howey* test—that profits be derived from the efforts of a promoter or other third party.[63] The court did not provide an explicit basis for this conclusion. Presumably, the fact that the corporations were required to obtain 85% of their income from shareholder assessments[64] and the overall nonprofit nature of the operation[65] precluded an expectation of profits from the efforts of others.[66]

## III. Delineation of the Contours of Justifiable Reliance in a Rule 10b-5 Action

The question of the degree of diligence necessary to find justifiable reliance in a private rule 10b-5 action was addressed by the Tenth Circuit Court of Appeals in *Zobrist v. Coal-X, Inc.*[67] *Holdsworth v. Strong*,[68] the first Tenth Circuit opinion to address this issue, held that an investor was required to prove that he justifiably relied on defendant's material misrepresentations in order to recover under rule 10b-5.[69] Under *Holdsworth*, justifiable reliance could be proved in either of two ways, depending on the nature of the alleged misrepresentation. If the misrepresentation consisted of an omission to state facts necessary to prevent a statement from being misleading, justifiable reliance was shown upon proof that the omissions were material.[70] If the misrepresentations consisted of affirmative misstatements, the factfinder was required to evaluate the facts and circumstances surrounding the misrepresentation and determine whether plaintiff was entitled to base his investment decision on the defendant's statements.[71] *Zobrist* considered two issues. The first was the extent to which a plaintiff was entitled to rely on oral statements contradicting written warnings in a Private Placement Memorandum.[72] The second was whether the inference of reliance arising from a material omission could be rebutted by defendants.[73]

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62. No. 81-1863, slip op. at 9.

63. *Id.* at 7, 9.

64. *Id.* at 7.

65. *See id.* at 8.

66. *Cf.* International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 561 (1979) (fundamental importance of employer contributions to success of pension plan indicative of lack of reliance on managerial efforts of others to generate profits).

67. 708 F.2d 1511 (10th Cir. 1983).

68. 545 F.2d 687 (10th Cir. 1976), *cert. denied*, 430 U.S. 955 (1977).

69. 545 F.2d at 696. The Tenth Circuit established the justifiable reliance requirement in order to ensure that a defendant was not penalized for misrepresentations which did not cause a plaintiff's loss. By requiring a showing of reliance, the plaintiff established a prima facie case of causality; by showing the reliance was justified in light of the circumstances of a case, the plaintiff established that the defendant was responsible for plaintiff's actions. *See id.* at 693-95.

70. *Id.* at 695 (quoting Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 153-54 (1972)). An omission is material when "a reasonable investor would have considered the facts important." 545 F.2d at 695.

71. *See* 545 F.2d at 695-97. *Holdsworth* did not provide an explicit set of criteria for evaluating reliance on affirmative misstatements, indicating only that the plaintiff's fault in relying on the misstatements must be less than the defendant's fault in making them. *Id.* at 693.

72. Zobrist v. Coal-X, Inc., 708 F.2d 1511, 1515 (10th Cir. 1983).

73. *Id.* at 1519-20.

A. *The Case*

*Zobrist* arose when the investments of plaintiffs Herman Zobrist, Neil Rasmussen, and Phil Rasmussen in Coal-X, Ltd./'76[74] appeared to have misfired. Plaintiffs filed suit against Coal-X, Inc., the general partner of Coal-X, Ltd./'76, and two of its officers who were alleged to have made false and misleading oral statements regarding the probability of success of the investment.[75] A federal district court jury found that the defendant officers of Coal-X, Inc. had "knowingly violated rule 10b-5 by misrepresenting material facts to Phil Rasmussen, that he justifiably relied on these misrepresentations, and that . . . he suffered $50,000 in damages."[76] The jury also found that the defendants had withheld material facts from Neil Rasmussen and Herman Zobrist, but that these plaintiffs had not relied on those omissions and were therefore not entitled to damages.[77] Coal-X, Inc. appealed the decision in favor of Phil Rasmussen; Neil Rasmussen and Zobrist cross-appealed the verdict in favor of Coal-X, Inc.[78]

B. *Effect of Failing to Read a Private Placement Memorandum*

At the crux of the Tenth Circuit's disposition of the cross-appeal against Phil Rasmussen was his failure to read the Private Placement Memorandum the defendants had provided to all three plaintiffs.[79] This Memorandum expressly recited the generally high risk of investing in a speculative business venture, and the specific risks and difficulties involved in operating a coal company.[80] Additionally, the Memorandum stated that no person had been authorized to make representations not contained in the document, and that potential investors should not rely on such representations.[81] Although Phil Rasmussen signed documents indicating he had read the Memorandum, it was undisputed that neither Phil nor the other plaintiffs read the document.[82]

Based primarily on Phil Rasmussen's failure to read the Private Placement Memorandum, the Tenth Circuit overturned the jury's finding of justifiable reliance, and reversed the jury award of $50,000.[83] The court reached its decision by charging Phil Rasmussen with constructive knowledge of the

74. Coal-X, Ltd./'76 was a Utah limited partnership organized to finance a West Virginia coal mining venture. *Id.* at 1513.

75. *Id.* at 1515.

76. *Id.*

77. *Id.*

78. *Id.*

79. The Coal-X Ltd./'76 stock was sold as a private offering pursuant to rule 146, 17 C.F.R. § 230.146 (1981). Compliance with rule 146 exempted issuers from the registration requirements of the Securities Act of 1933. *See* Rule 146-Transactions by an Issuer Deemed Not to Involve Any Public Offering, SEC Securities Act Release No. 33-5487 (April 23, 1974). Rule 146 required issuers to furnish an offering memorandum with information essentially equivalent to that provided by a prospectus. 17 C.F.R. § 230.146(e)(1) (1981). Rule 146 has since been withdrawn, 47 Fed. Reg. 11261 (1982), and has been replaced by Regulation D, 17 C.F.R. § 240.501-.506 (1983). *See* 47 Fed. Reg. 11252 (1982).

80. 708 F.2d at 1517.

81. *Id.* at 1517-18.

82. *Id.* at 1514.

83. *Id.* at 1518-19.

risks stated in the Private Placement Memorandum,[84] and then examining his conduct in light of that knowledge. The court found that Phil had acted recklessly by relying on defendants' oral statements without investigating the discrepancy between those statements and the risk factors contained in the Memorandum.[85] The court held that in light of his reckless behavior, Phil Rasmussen's reliance on the defendants' fraudulent claims was unjustifiable.[86]

### C. *Presumption of Reliance on Material Omission is Rebuttable*

Neil Rasmussen and Zobrist argued that the trial court had improperly instructed the jury that the plaintiffs bore the burden of proving reliance on the defendants' omission of material facts.[87] The district court's instruction stated that once plaintiffs proved an intentional omission of material fact, the defendants were required to prove that plaintiffs would have acted no differently even if the omitted information had been disclosed.[88] The Tenth Circuit held that this instruction was proper, because the trial court had correctly instructed the jury that the presumption of reliance arising from proof of an intentional material omission was a rebuttable presumption.[89] Because plaintiffs had not read the Memorandum, substantial evidence supported the jury's verdict that the nondisclosures had not, in fact, caused plaintiffs' actions, and that the plaintiff had therefore not relied on the omissions.[90]

### D. *Judge Holloway's Dissent*

In a forceful dissent, Judge Holloway disagreed with the majority's holding with respect to Phil Rasmussen. The dissent cited the portion of *Holdsworth v. Strong*[91] which held that a plaintiff's conduct in a securities transaction could only bar recovery under rule 10b-5 when the plaintiff's actions could be characterized as misconduct comparable to that of the defendant.[92] Noting that the special verdict forms established that the defendants had engaged in deliberate misconduct,[93] the dissent contended that liability for intentional misconduct should not be immunized by a plaintiff's negligence or recklessness.[94] Judge Holloway perceived the federal concern with deterring intentional misconduct to outweigh that of deterring negli-

84. *Id.* at 1518. The Tenth Circuit noted that failure to charge an investor with knowledge of the information contained in a Private Placement Memorandum would place that investor in a better position, with respect to justifiable reliance, than the investor who had read the document. Thus, to encourage investor prudence and to prevent unfairness to prudent investors, knowledge of information supplied by legal mandate was imputed to an investor. *Id.*

85. *Id.* at 1518-19.

86. *Id.* at 1518.

87. *Id.* at 1519.

88. *See id.*

89. *Id.*

90. *Id.* at 1520.

91. 545 F.2d 687 (10th Cir. 1976), *cert. denied*, 430 U.S. 955 (1977).

92. 708 F.2d at 1520 (Holloway, J., dissenting). *See Holdsworth*, 545 F.2d at 693.

93. *See* 708 F.2d at 1520 & n.1 (Holloway, J., dissenting).

94. *Id.* at 1523. Judge Holloway also observed that the special verdicts had absolved Paul Rasmussen of intentionally ignoring the possibility of misrepresentation. *Id.* at 1522.

gent or reckless conduct.[95] The majority's decision, which exonerated defendants engaged in intentional misconduct through imputing knowledge of "defendants' exculpatory boilerplate"[96] to the plaintiff, frustrated that policy. Accordingly, Judge Holloway dissented.

E. *Critique*

It is difficult to square the majority's decision in *Zobrist* with its holding in *Holdsworth* that a plaintiff's conduct bars recovery only when it is of comparable culpability to that of the defendant.[97] Although Phil Rasmussen's failure to read the Private Placement Memorandum clearly was negligent, the court elevated this conduct to recklessness by the questionable artifice of imputing constructive knowledge of the Memorandum's contents.[98] Even accepting the court's finding of recklessness, it seems improper to equate the plaintiff's recklessness with the defendants' deliberate fraud and misrepresentation and bar all recovery for the plaintiff.[99] The central purpose of the 1933 and 1934 Acts was to prevent fraud in the financial marketplace, not to institutionalize caveat emptor.[100] Although the majority carefully noted that constructive knowledge of the warnings contained in the Memorandum could not, in and of itself, exonerate the defendants,[101] the result reached by the majority appears to unnecessarily protect, and perhaps encourage,[102] securities fraud.

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95. *Id.* at 1522.

96. *Id.* at 1523.

97. 545 F.2d at 693. *See supra* note 71.

98. *But see* Shappirio v. Goldberg, 192 U.S. 232 (1904). The Court, in rejecting a common law fraud claim, held that "when the means of knowledge are open and at hand or furnished to the purchaser or his agent and no effort is made to prevent the party from using them . . . he will not be heard to say that he has been deceived to his injury by the misrepresentations of his vendor." *Id.* at 241-42.

99. *Cf.* Note, *A Comparative Fault Approach to the Due Diligence Requirement of Rule 10b-5*, 49 FORDHAM L. REV. 561, 575-88 (1981) (author proposes adapting contributory fault principles for use in securities fraud cases in order to avoid injustice of foreclosing all relief for negligent or reckless plaintiffs deliberately defrauded in securities transactions).

100. *See* United Hous. Found., Inc. v. Forman, 421 U.S. 837, 849 (1977). *See also Zobrist*, 708 F.2d at 1523 (Holloway, J., dissenting) (the majority's holding acts to favor those found guilty of knowing misconduct and to frustrate the antifraud policy of the securities laws and rule 10b-5).

101. 708 F.2d at 1517.

102. Judge Holloway cited evidence in the record indicating that the defendants had consciously dissuaded the plaintiffs from reading the Memorandum. *Id.* at 1522-23 (Holloway, J., dissenting).

# TAXATION

## OVERVIEW

The Tenth Circuit Court of Appeals selected for publication approximately half of the federal taxation cases it decided in the period covered by this survey. For the most part, the court addressed routine issues and followed established precedents. Some of the issues considered, however, including third-party recordkeeper summonses and the availability of the fifth amendment privilege against self-incrimination in the tax context, are currently of major interest throughout the country. The primary consideration in preparing this article was to elucidate the Tenth Circuit's interpretation of the law in order to aid attorneys in preparing presentations to the court.

## I. CRITERIA FOR IMPOSING THE ACCUMULATED EARNINGS TAX

In *Guarantee Abstract Title Co. v. United States*,[1] the Tenth Circuit Court of Appeals addressed the issue of what constituted sufficient evidence of a company's plan for using its accumulated earnings to avoid imposition of the accumulated earnings tax.[2] In contesting imposition of the accumulated earnings tax, the taxpayer must present objective evidence of a specific and definite plan for using accumulated earnings.[3] The plan need not be written.[4] The "reasonableness" of the need for the questioned accumulation is determined case by case on a fact and circumstances basis in light of the specific plan of the company in question.[5]

In *Guarantee Abstract* the Tenth Circuit affirmed the district court's judgment, finding sufficient evidence to support the jury's finding that Guarantee had a definite plan for its accumulated earnings, and that the accumulations were reasonable in light of that plan.[6] The court observed that although a formal plan would normally be contained in corporate minutes, a closely held corporation like Guarantee might be run informally and a definite plan might not be found in the minutes.[7]

The court of appeals found objective evidence of a definite plan in the testimony of the stockholders and their accountants. This testimony showed

1. 696 F.2d 793 (10th Cir. 1983).

2. I.R.C. §§ 531-537 (1982). The accumulated earnings tax is a penalty tax imposed upon corporations which accumulate earnings beyond the reasonable needs of their business. *See id.* §§ 531-533. Its purpose is to prevent avoidance of the income tax imposed on distributions to shareholders. *See id.* § 532. *See generally* United States v. Donruss Co., 393 U.S. 297, 303 (1969).

3. 696 F.2d at 795 (citing Cheyenne Newspapers, Inc. v. Commissioner, 494 F.2d 429, 433-34 (10th Cir. 1974); Henry Van Hummell, Inc. v. Commissioner, 364 F.2d 746, 750 (10th Cir. 1966), *cert. denied*, 386 U.S. 956 (1967)).

4. 696 F.2d at 795 (citing Hogg's Oyster Co. v. United States, 676 F.2d 1015, 1018 (4th Cir. 1982)).

5. *Cf.* Treas. Reg. 1.533-1(2) (1959) (tax avoidance purpose in accumulating earnings to be determined on case by case basis).

6. 696 F.2d at 795-96.

7. *Id.* at 795.

that Guarantee, an abstract and title company, intended to become a title insurance company and required increased accumulations to insure against the higher risks associated with the title insurance business.[8] There was also evidence that the earnings were accumulated to cover anticipated increased operating expenses as well as potential policy and litigation losses.[9] The court viewed Guarantee's practice of keeping its accumulated earnings in short term notes on deposit with mortgage lenders as corroborative of its asserted plan, because that practice ensured liquidity to meet title losses and was a reasonable method of generating title business.[10] In light of Guarantee's proof of an established plan, the accumulated earnings tax was held to have been improperly assessed against Guarantee, entitling Guarantee to a refund of the accumulated earnings tax it had paid.[11]

## II. MINIMUM TAX: AN INCOME TAX THAT CAN CONSTITUTIONALLY BE APPLIED RETROACTIVELY

In *Ward v. United States*,[12] the court considered several issues regarding the minimum tax. The minimum tax is a tax, in addition to the regular income tax, which is imposed on individuals and corporations having tax preference income in excess of a specified amount.[13] Congress' purpose in imposing the minimum tax was to increase the income tax liability of taxpayers who are able to reduce their taxable income drastically by claiming preferential tax treatment with respect to special income items or allowed deductions.[14]

The Wards were independent oil and gas producers who, in 1964, elected to exercise their one-time option to deduct all intangible drilling costs (IDC's) associated with their drilling programs as current expenses, rather than to capitalize and amortize those costs.[15]

In 1976, Congress added intangible drilling costs to the list of tax preference items, and imposed a minimum tax on the amount by which the one-time deduction for these costs exceeded the amount which would have been deductible if such costs had been capitalized using the straight line method of amortization.[16] This tax was imposed on the Ward's income for 1976,

8. *Id.*

9. *Id.* Evidence of Guarantee's past losses was significant in establishing the reasonableness of its reserves. *See id.* Accumulation for theoretical contingencies is insufficient to avoid the accumulated earnings penalty. *See* Cheyenne Newspapers, Inc. v. Commissioner, 494 F.2d 429, 433 (10th Cir. 1974).

10. 696 F.2d at 796.

11. *Id.*

12. 695 F.2d 1351 (10th Cir. 1982).

13. *See* I.R.C. §§ 55, 56 (1982) (amended 1983). Tax preference income includes both direct cash income and direct economic benefits such as accelerated depreciation. *E.g.*, Graff v. Commissioner, 74 T.C. 743, 766 (1980).

14. H.R. REP. NO. 91-413, 91st Cong., 1st Sess. 78, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS 1645, 1725 *and* 1969-3 C.B. 200, 249; S. REP. NO. 91-552, 91st Cong., 1st Sess. 113, *reprinted in* 1969 U.S. CODE CONG. & AD. NEWS, 1645, 2144 *and* 1969-3 C.B. 423, 426.

15. 695 F.2d at 1352. The Wards exercised the option provided by I.R.C. § 263(c) (1982) (amended 1983). This is an irrevocable option which a taxpayer may elect only in the first taxable year in which intangible drilling costs are incurred. *See* Treas. Reg. 1.612-4(d)(1965).

16. *See* I.R.C. § 57(a)(11), (d)(1982).

thereby increasing their tax liability.[17]

After paying the increased minimum tax and being denied a refund, the Wards sued to recover the tax paid.[18] The Wards claimed that imposing the tax retroactively to the beginning of the taxable year was unconstitutional and that, even if the retroactive application was constitutional, the tax was not an income tax but an excise tax and therefore deductible as an ordinary business expense.[19] The district court rejected these contentions, and granted summary judgment in favor of the Internal Revenue Service (IRS).[20]

### A. *Retroactive Application of the Minimum Tax is Constitutional*

The Tenth Circuit held that due process is not necessarily violated by retroactive application of an income tax statute to the entire calendar year of its enactment.[21] Rather, it is necessary to consider the nature of the tax and the circumstances surrounding its enactment in order to determine whether it can be retroactively applied.[22] The court noted a distinction between imposing a tax on an activity never before taxed and changing the rate for an activity already taxed.[23] In the latter case, the taxpayer has no vested right in any particular tax rate, because it is readily foreseeable that Congress can and will change existing tax rates[24] The Wards argued, however, that they could not have forseen that IDC's would be added to the list of minimum tax preference items, and that retroactive imposition of this tax change was therefore unconstitutional as to them. This argument was rejected by the court because evidence showed that the Wards had lobbied extensively against the inclusion of IDC's as a tax preference item, and therefore should have been able to forsee the extension of the minimum tax.[25] Hence, retroactive imposition of the tax on the Wards was not unconstitutional.[26]

The court supported its holding by pointing to two policy considerations indicating that courts should defer to Congress' retroactive application of a tax. First, because the income tax is not a penalty but a means of apportioning the cost of government, retroactivity allows "better allocation" of the tax burden to those Congress decides should bear it.[27] Second, the court observed that the Supreme Court has regularly upheld the constitutionality of Congress' practice of giving general revenue statutes retroactive applica-

17. 695 F.2d at 1352.

18. *Id.*

19. *Id.* at 1352-53.

20. *Id.* at 1352.

21. *Id.* at 1353 (quoting United States v. Darusmont, 449 U.S. 292, 296-97 (1981)). *Darusmont* upheld retroactive application of increases in existing minimum tax provisions. 449 U.S. at 300-01.

22. 695 F.2d at 1353 (quoting Welch v. Henry, 305 U.S. 134, 147-48 (1938)).

23. 695 F.2d at 1354 (quoting Appendrodt v. United States, 490 F. Supp. 490, 492 (W.D. Pa. 1980) (quoting Judge Learned Hand in Cohan v. Commissioner, 39 F.2d 540, 545 (2d Cir. 1930))).

24. 695 F.2d at 1354.

25. *Id.* The district court found that Mr. Ward had made several trips to Washington during 1975-76 to lobby against the tax, and that he should therefore have considered the possibility of the tax when planning his drilling program. *Id.*

26. *Id.*

27. *Id.*

tion to the entire calendar year of enactment.[28]

### B. *The Minimum Tax is an Income Tax*

The Tenth Circuit also disagreed with the Wards' contention that the minimum tax was an excise tax and hence deductible as an ordinary business expense.[29] The language of the statute states that the minimum tax is imposed "[i]n addition to the other taxes imposed by this chapter."[30] The court observed that the IRS has "consistently treated the tax as an income tax,"[31] and pointed out that all other courts which have considered the issue have found the minimum tax to be an income tax.[32] Further, the legislative history of the minimum tax indicated that Congress intended the minimum tax to be an income tax.[33] The court then rejected the Wards' claimed refund because the minimum tax, as an income tax, is "specifically barred as a deduction."[34]

## III. SOLE SHAREHOLDER HAS NO RIGHT TO DEDUCT INTEREST PAID ON CORPORATE DEBT

In *Crouch v. United States*[35] the Tenth Circuit considered two claims made by the sole shareholder of a corporation: 1) that he was entitled to deduct the corporation's net operating loss from his personal return because the corporation was a subchapter S corporation,[36] and 2) that he was entitled to a personal deduction for interest paid on a loan made to his corporation.[37] The court affirmed the district court's denial of both claims.[38]

### A. *Personal Deduction for Interest Paid on Corporate Indebtedness*

With respect to the interest deduction, the facts revealed that Crouch, as sole shareholder, had formed Seventeen Ventures, Inc. to build a luxury apartment complex in Florida.[39] Crouch had used the corporate form to avoid state usury law limitations on the interest which could be charged on loans to individuals.[40] Crouch personally guaranteed payment of the corporation's note, agreeing that the lender need not pursue any remedies against the corporation before collecting under the guarantee.[41] Crouch's subsequent payments on the corporate indebtedness included an interest component, which he deducted on his personal tax return.[42]

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28. *Id.* at 1353.
29. *Id.* at 1355. See I.R.C. § 56(a)(1982).
30. I.R.C. § 56(a)(1982).
31. 695 F.2d at 1355 (citing Rev. Rul. 77-396, 1977-2 C.B. 86).
32. 695 F.2d at 1355.
33. *Id.*
34. *Id.* I.R.C. § 275(a)(1)(1982) specifically disallows deductions for federal income taxes.
35. 692 F.2d 97 (10th Cir. 1982).
36. *Id.* at 98.
37. *Id.*
38. *Id.* at 100-01.
39. *Id.* at 98.
40. *Id.*
41. *Id.*
42. *Id.*

In affirming the district court's order upholding the IRS's denial of the interest deduction, the Tenth Circuit observed that interest payments are deductible only if made with respect to a taxpayer's own debts.[43] Crouch had contended that the debt was personal to him because of the unconditional guarantee, and because the lender knew the corporation could not make the payments and expected Crouch to pay.[44] The court held, however, that the corporate form of a transaction cannot be ignored when that form has served a legitimate purpose.[45] The corporate form had served Crouch's purpose to avoid the usury laws, and he was bound to accept the tax consequences of his choice. Because the corporation was a legal entity separate from its shareholder the corporation, and not its sole shareholder Crouch, was entitled to the deduction for interest payments on corporate debt.[46]

Crouch argued alternatively that he was entitled to deduct the interest payment on the corporate debt because he was the equitable owner of the corporate assets.[47] The court held that the concept of equitable ownership applied in only two situations,[48] neither of which was present.[49] Thus, this exception did not entitle Crouch to a personal deduction for the interest paid on his corporation's indebtedness.[50]

### B. *Loss of Subchapter S Status for Seventeen Ventures, Inc.*

The Tenth Circuit also considered Crouch's claim that he was entitled to a personal deduction for the 1970 net operating loss suffered by Seventeen Ventures, Inc., which had become a subchapter S corporation in 1969.[51] The court affirmed the district court's determination that because Seventeen Ventures had lost its subchapter S status, Crouch was not entitled to a deduction based on passthrough of the net operating loss.[52]

Crouch presented two arguments in opposition to this result. The government had asserted that more than twenty percent of the corporation's gross receipts were rent, which was passive investment income, and that the corporation's subchapter S status was therefore automatically terminated

43. *Id.* at 99.

44. *Id.*

45. *Id.*

46. *Id.* at 100.

47. *Id.* Treas. Reg. § 1.163-1(b) (1957) permits a taxpayer to deduct interest payments he makes pursuant to real estate mortgage when the taxpayer is the legal or equitable owner of the nortgaged property even though the taxpayer is not directly liable on the note incident to the mortgage.

48. The Tenth Circuit held that the concept of equitable ownership under Treas. Reg. § 1.163-1(b)(1957) is only applicable either 1) when a trust beneficiary has equitable title to property held by a trustee, or 2) under the doctrine of equitable conversion when real estate has been sold under a contract for a deed with legal title remaining in the seller until the total purchase price has been paid. 692 F.2d at 100. The Tenth Circuit did not rule on the IRS argument that the regulation could not, as a matter of law, apply in the close corporation context. *Id.*

49. 692 F.2d at 100.

50. *Id.*

51. *See id.* at 98.

52. *Id.* at 101.

under the existing subchapter S statute.[53] In opposition, Crouch first argued that the rent received was not passive investment income, but rather was income derived from the active business operation of the corporation, which was renting apartments.[54] The Tenth Circuit pointed out that the then-existing subchapter S explicitly listed rent as passive investment income,[55] and declined to accept Crouch's argument that the rent derived from the business of renting apartments was not passive investment income.[56]

Crouch then argued that Seventeen Ventures provided "significant services" in connection with renting its apartments, so that, under a subchapter S regulation,[57] the payments received were not "rents" within the meaning of subchapter S.[58] The court found that the services provided by Seventeen Ventures were those commonly provided in luxury apartment complexes,[59] and held that the exemption Crouch relied on was provided for operations similar to hotels and motels, not for apartment complexes providing deluxe services.[60] Hence, the rents received were passive investment income, and because those rents constituted more than twenty percent of the corporation's gross receipts, the corporation's subchapter S status was lost.[61] Given the loss of subchapter S status, there could be no passthrough of the corporation's net operating loss to Crouch.[62]

## IV. FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION IN CIVIL TAX PROCEEDINGS

Only those subject to actual or potential criminal prosecution can claim the fifth amendment[63] privilege against self-incrimination.[64] In the federal tax context, a taxpayer can be subject to both civil and criminal penalties for an act or subject only to civil penalties, depending on the penalty provision

53. *Id.* at 100. At the time *Crouch* was decided, I.R.C. § 1372(e)(5) (1982) provided that if a subchapter S corporation received more than 20% of its gross receipts from passive investment income, its subchapter S status was automatically terminated. Congress amended subchapter S's passive income automatic termination provisions in the Subchapter S Revision Act of 1982, Pub. L. No. 97-354, 96 Stat. 1669, 1674 (to be codified at I.R.C. § 1362(d)(3) (1982).

54. 692 F.2d at 100.

55. I.R.C. § 1372(e)(5)(C)(1976)(amended by Subchapter S Revision Act of 1982, Pub. L. No. 97-354, 96 Stat. 1669, 1674 (to be codified at I.R.C. § 1362(d)(3)(D)(1982))).

56. 692 F.2d at 101. The court relied on its decision in Marshall v. Commissioner, 510 F.2d 259 (10th Cir. 1975), which held that a taxpayer in the business of making loans was not entitled to subchapter S status because subchapter S listed interest as passive investment income. *Id.* at 264.

57. Treas. Reg. § 1.1372-4(b)(5)(iv)(b)(vi)(1959) provides that rents do not include payment for use of rooms where "significant services" are rendered to the occupant. "Significant services" are rendered to an occupant if the services are primarily for his convenience and are other than those customarily rendered in connection with rental for occupancy only. Examples of "significant services" are maid services and parking of autos; heat, light, and trash collection are not such services. *Id.*

58. 692 F.2d at 101.

59. *Id.* The services included a swimming pool, party room, laundry room, message service, and others. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. U.S. CONST. amend. V, cl. 3 provides: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

64. Hoffman v. United States, 341 U.S. 479 (1951).

of the statute in question. The determination of whether or not a taxpayer may claim the benefit of the fifth amendment privilege depends upon whether he is subject, or has a reasonable belief that he may be subject, to criminal prosecution.[65] Among the cases the Tenth Circuit considered involving a taxpayer's assertion of the fifth amendment privilege were two in which the court reached apparently opposite conclusions.[66] A comparison of these two cases, however, illuminates the precise analysis necessary for success in this area of law rather than inconsistent holdings.

A. Mertsching v. United States

The facts in *Mertsching v. United States*[67] revealed that Mertsching, a tax preparer, was assessed penalties for "negligently or intentionally disregarding revenue rules and regulations in preparing tax returns."[68] Specifically, the IRS contended that Mertsching prepared returns which sought to assign income by means which well established case law held impermissible.[69] Mertsching paid fifteen percent of the penalties, thereby precluding immediate IRS action to collect the entire penalty,[70] and filed a suit for determination of his liability. The United States sought to depose Mertsching in that suit and Mertsching filed an objection to the deposition request, asserting that the deposition would violate his fifth amendment privilege against self-incrimination.[71] The district court granted the United States' motion to compel discovery, advising Mertsching that his case would be dismissed if he did not submit to deposition.[72] Mertsching refused to comply with the district court's order, and the court granted the United States' motion to dismiss Mertsching's suit with prejudice.[73] Mertsching appealed the dismissal to the Tenth Circuit, claiming that the proceeding was criminal in nature, and that he was therefore entitled to assert the fifth amendment privilege against self-incrimination to insulate himself from being deposed.[74]

In affirming the order of the district court the Tenth Circuit noted that the Supreme Court has held that the right against self-incrimination only applies in suits where a responsive answer to a question, or an explanation of why it cannot be answered, exposes the claimant to prosecution for a crime.[75] The Tenth Circuit further noted that the penalties assessed against Mertsching were civil, not criminal.[76] The court therefore held that Mertsching had inappropriately claimed fifth amendment protection, and that

65. *See generally* United States v. Jones, 703 F.2d 473 (10th Cir. 1983).

66. Mertsching v. United States, 704 F.2d 505 (10th Cir.), *cert. denied*, 104 S. Ct. 105 (1983); United States v. Jones, 703 F.2d 473 (10th Cir. 1983).

67. 704 F.2d 505 (10th Cir.), *cert. denied*, 104 S. Ct. 105 (1983).

68. 704 F.2d at 506. The penalties were assessed pursuant to I.R.C. § 6694(a)(1982).

69. *See* 704 F.2d at 506 & n.2.

70. *See* I.R.C. § 6694(c)(1982).

71. 704 F.2d at 506.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* (citing Hoffman v. United States, 341 U.S. 479, 487 (1951)).

76. 704 F.2d at 506. The court's decision was reached by comparing I.R.C. § 6694(a) (1982), the source of liability for negligence by tax preparers, with I.R.C. § 6653 (1982), which provides penalties for individuals negligently preparing their own tax returns. Section 6653 had

the district court had not abused its discretion in dismissing Mertsching's action based on his failure to obey a court order to provide discovery.[77]

## B. United States v. Jones

In *United States v. Jones*,[78] the facts revealed that Mr. and Mrs. Jones had been the subjects of an IRS investigation of their financial affairs over a ten year period. The IRS had initiated a tax deficiency suit against the Joneses' and had pursued a civil action against them to judgment. Because the United States had collected only a small amount pursuant to that judgment, however, Mr. Jones was asked to appear at a hearing in aid of execution of judgment.[79] Jones appeared, and was questioned about the amount and sources of his income and the nature and location of his assets.[80] Jones refused to answer the questions, asserting his fifth amendment privilege against self-incrimination, and was held in contempt of court.[81] At a later hearing Mrs. Jones was also cited for contempt for refusing, on fifth amendment grounds, to answer similar questions.[82] Both appealed the contempt citations.

Jones' fifth amendment claim was based on the assertion that answering the questions could provide incriminating evidence of two crimes: 1) making a false statement to a federal officer in violation of 18 U.S.C. § 1001[83] and 2) attempted tax evasion under section 7201 of the Internal Revenue Code.[84]

### 1. False Statements to IRS Agent

Prior to the hearing in aid of execution an IRS agent had interviewed Jones.[85] The agent filed an uncontested affidavit with the district court stating that Jones had not provided any information at that interview.[86] The Tenth Circuit observed that because Jones had made no statement, nothing that he could have said at the judgment execution hearing could contradict statements made to a federal officer.[87] Because there was therefore no basis for criminal prosecution under 18 U.S.C. § 1001, Jones had no reasonable fear of criminal prosecution on which to base his fifth amendment claim.[88] The Tenth Circuit therefore rejected Jones' first ground for invoking the fifth amendment privilege.[89]

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been consistently interpreted as creating civil liabilities; ergo, section 6694(a) created only civil penalties. 704 F.2d at 507.

77. 704 F.2d at 507.
78. 703 F.2d 473 (10th Cir. 1983).
79. *Id.* at 474.
80. *Id.*
81. *Id.* at 475.
82. *Id.*
83. 18 U.S.C. § 1001 (1982).
84. I.R.C. § 7201 (1982).
85. 703 F.2d at 475.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*

2. Attempted Tax Evasion

The Tenth Circuit, however, vacated the district court's contempt order against both Mr. and Mrs. Jones because of the potential of prosecution for attempted tax evasion.[90] In an illuminating discussion of this area of law, the Tenth Circuit detailed the factors which underlie a taxpayer's successful assertion of the fifth amendment privilege.

The privilege against self-incrimination extends to civil actions, whether the claimant is a party or a witness.[91] The privilege is implicated when a question requires either "answers that would in themselves support a conviction" or answers that would "furnish a link in the chain of evidence needed to prosecute the claimant for a crime."[92] The witness may assert the privilege when his fear of incrimination is "reasonable in light of the witness' specific circumstances, the context of the questions, and the setting in which the questions are asked."[93] The privilege exists only when a real danger of prosecution exists; mere speculation that the answer will create a danger of prosecution is insufficient.[94]

In Jones' case, he had been the target of both civil and criminal investigation by the IRS for more than ten years.[95] In the early 1970's Jones had been the target of a criminal investigation for tax fraud,[96] but had been given immunity in exchange for testimony which resulted in his law partner's conviction for conspiracy to commit tax fraud.[97] Although the proceeding involving Jones' fifth amendment claim related to collecting a judgment concerning tax years 1963-69, at the time of that proceeding the IRS was suing Jones in a civil action for taxes allegedly owing for tax years 1973-79.[98] The court found the civil tax deficiency litigation against Jones indicative of both the IRS's institutional focus on Jones' tax behavior during 1973-79 and the IRS's belief that Jones had not accurately reported his income during that period.[99] If it were true that Jones willfully failed to report income for that period, he was subject to criminal prosecution.[100] Questions concerning the nature and location of his assets were therefore potentially incriminating, even though asked in the context of an unrelated civil proceeding.[101] Given Jones' prior involvement with the IRS and the ongoing civil deficiency proceedings, it was reasonable for him to fear that his answers might provide "links in a chain of evidence on criminal charges

90. *Id.* at 478-79.

91. *Id.* at 475 (citing Maness v. Myers, 419 U.S. 449, 464 (1975); Kastigar v. United States, 406 U.S. 441, 444-45 (1972)).

92. Hoffman v. United States, 341 U.S. 479, 486 (1951).

93. 703 F.2d at 476 (citing Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472, 480 (1972); Malloy v. Hogan, 378 U.S. 1, 11-14 (1964); Hoffman v. United States, 341 U.S. 479, 486 (1951)).

94. 703 F.2d at 476. *See* Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972).

95. 703 F.2d at 476.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. A willful attempt to avoid tax liability is a felony. I.R.C. § 7201 (1982).

101. 703 F.2d at 476.

of attempt to evade payment of taxes."[102]

3. IRS Use of Affidavits Asserting no Current Prosecution

The Tenth Circuit also addressed the propriety of the district court's apparent reliance on an IRS affidavit in reaching its conclusion that Jones was not entitled to assert the privilege against self-incrimination.[103] The affidavit, prepared by an IRS agent, stated that no criminal charges had been referred to the Justice Department and that no criminal investigation of Jones was pending.[104] The court of appeals stated that the fact that no criminal prosecution was pending was not a guarantee that there would be no future prosecution,[105] and pointed out that the government might discover something from answers to its questions that might cause it to decide to prosecute Jones criminally.[106] Because the district court's obligation in the self-incrimination inquiry is solely to determine whether answers would tend to incriminate the witness, the court acted incorrectly in attempting to speculate whether the witness would in fact be prosecuted.[107] The court noted that the government's legitimate interest in collecting judgments cannot be allowed to override legitimate fifth amendment claims, and that if the government was in fact interested only in collecting the civil judgment, it could grant Jones immunity in exchange for the privileged information.[108]

4. Derivative Claim of Immunity

Although Mrs. Jones was never herself the target of an IRS criminal investigation, she was both a target of the civil investigation relating to the 1973-79 tax years and a party to the judgment debtor action relating to the 1963-69 tax years.[109] The Tenth Circuit vacated the contempt order against Mrs. Jones, holding that she shared her husband's reasons for fearing criminal prosecution for tax evasion.[110] Because she had filed jointly with her husband, questions relating to her husband's assets would tend to incriminate both spouses.[111] Therefore, she too could validly claim the protection afforded by the fifth amendment.[112]

C. *Contrasting* Mertsching *and* Jones

In comparing the results in *Mertsching* and *Jones*, it is crucial to recognize that in *Mertsching* the fifth amendment claim was asserted under a statute which provided only civil penalties.[113] No potential for criminal prosecution under any other statute could have resulted from Mertsching's

102. *Id.* at 477.
103. *See id.*
104. *Id.*
105. *Id.* at 478.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 479. The Joneses had filed joint tax returns for all the years in question. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *See supra* notes 75-77 and accompanying text.

compliance with the discovery order. In contrast, the Joneses' fifth amendment claims were asserted with specific reference to a statute providing criminal penalties for conduct which might be revealed by their answers.[114] *Jones* highlights the need for attorneys to be aware of the potential for prosecution under criminal statutes when representing clients in civil tax proceedings.

## V. THIRD-PARTY RECORDKEEPER CASES

Cases involving third-party recordkeepers[115] are of great current interest in the tax context as well as in the securities context.[116] They involve significant privacy issues. The Tenth Circuit considered a number of these cases in the period covered by this survey.

Sections 7601-7611 of the Internal Revenue Code[117] contain the provisions for examination and inspection of tax records held by third parties. The IRS is empowered to make such examinations and inspections as a means of determining the tax liability of any person.[118] Pursuant to this authority, the Internal Revenue Service may cause a summons to issue requiring the taxpayer or any person having "possession, custody, or care of books of account containing entries relating to the business of the taxpayer to produce such records for inspection."[119] Special procedures are provided for third-party summonses.[120] Where the summons does not identify the person with respect to whose liability the summons is issued, a so-called "John Doe summons" is used.[121] To obtain a John Doe summons, the IRS must establish, in a court proceeding, 1) that the summons relates to an investigation directed at a particular person or group of persons; 2) that a reasonable basis exists for believing that such person or group either has failed, or may fail, to comply with the provisions of the internal revenue laws; and 3) that the information sought to be obtained from an examination of the records, including the identity of the taxpayer, is not readily available from other sources.[122]

### A. *Taxpayer Challenge to Validity of John Doe Summons Permitted*

*United States v. Brigham Young University*[123] is an especially interesting case in this area of the law even though it has no precedential value.[124] Brigham

114. *See supra* note 100 and accompanying text, and text accompanying notes 110-11.

115. A third-party recordkeeper is a person having possession, custody, or care of accounting books containing entries relating to a taxpayer's business. *See* I.R.C. § 7602(a)(2)(1982).

116. *See* Jerry T. O'Brien, Inc. v. S.E.C., 704 F.2d 1065 (9th Cir. 1983).

117. I.R.C. §§ 7601-7611 (1982).

118. *See* I.R.C. § 7601 (1982).

119. *See* I.R.C. § 7602(a)(2) (1982).

120. *See generally* I.R.C. § 7609 (1982).

121. *See generally* Friedland, *Internal Revenue Service Investigations of Unidentified Persons*, 60 DEN. L.J. 573 (1983).

122. *See* I.R.C. § 7609(f) (1982).

123. 679 F.2d 1345 (10th Cir. 1982), *cert. granted* and *decision vacated and remanded for consideration of mootness*, 103 S.Ct. 713, *decision vacated and appeal dismissed on remand*, No. 80-1508 (10th Cir. April 13, 1983).

124. *See infra* text accompanying notes 146-48.

Young University (BYU) is a tax exempt institution of higher learning.[125] Gifts to BYU are considered charitable contributions deductible from the donor's income.[126] In the case of gifts in-kind, donors are allowed a deduction equal to the fair market value of the gift.[127]

The IRS had audited the returns of 162 donors of gifts in-kind to BYU, and in every case discovered that the donor had overvalued his gift.[128] The IRS, after complying with statutorily required procedures, was granted a John Doe summons.[129] BYU refused to comply with the summons[130] and the United States instituted enforcement proceedings.[131] At the enforcement hearing, BYU asserted that the IRS had failed to establish a reasonable basis for believing that the in-kind donations of the taxpayers whose records were sought had been overvalued,[132] and that the government had therefore failed to comply with the statutory requirements for obtaining the John Doe summons served on BYU.[133] The district court agreed with BYU, and refused to enforce the summons.[134] The United States appealed.[135]

On appeal, the government asserted that BYU could not challenge, in an enforcement proceeding, the determination made in the ex parte summons hearing that the IRS had established the required reasonable basis for believing potential or actual violations of the tax laws existed.[136] The Tenth Circuit disagreed, holding that although the initial determination of the government's reasonable basis could be made on an ex parte basis, a taxpayer subject to an enforcement proceeding could challenge the summons on "any appropriate grounds."[137] Thus, BYU had the right to challenge the reasonableness of the IRS's belief that BYU's in-kind donors might have violated the revenue laws.[138]

The Tenth Circuit concluded, however, that the IRS had in fact estab-

125. *See* I.R.C. § 501(c)(3) (1982), which exempts from taxation corporations organized and operated exclusively for educational purposes.

126. *See* I.R.C. § 170(a)(1), (c)(2) (1982).

127. *See* Treas. Reg. § 1.170A-1(c)(1), T.D. 7207, 1972-2 C.B. 108, 116.

128. 679 F.2d at 1348.

129. *Id.* at 1346-47. I.R.C. § 7609(f) (1982) requires a showing of relevance and necessity to obtain a John Doe summons. I.R.C. § 7609(h)(1) (1982) provides that such a summons may issue after an ex parte hearing in which the court may determine the facts solely on the basis of the IRS's petition and supporting documents.

130. 679 F.2d at 1347.

131. *Id.* I.R.C. § 7402(b)(1982) and I.R.C. § 7604(a)(1982) both grant federal district courts jurisdiction to enforce an IRS summons.

132. 679 F.2d at 1347.

133. *Id.* As noted above, under I.R.C. § 7609(f)(1982) a John Doe summons will not be issued unless the IRS shows it has a reasonable basis for believing the object of its investigation may fail, or may have failed, to comply with the internal revenue laws. *See supra* note 122 and accompanying text.

134. 679 F.2d at 1347.

135. *Id.* at 1346.

136. *Id.* at 1347.

137. *Id.* at 1348 (citing Reisman v. Caplin, 375 U.S. 440, 446 (1964)). *Accord* United States v. Pittsburgh Trade Exch., Inc., 644 F.2d 302 (3d Cir. 1981). The Tenth Circuit also indicated that the district court had the power, in an enforcement proceeding, to challenge a John Doe summons sua sponte. *See* 679 F.2d at 1348 (citing United States v. Powell, 379 U.S. 48, 58 (1964)).

138. 679 F.2d at 1348.

lished the required "reasonable belief."[139] The government had audited the returns of 162 contributors in kind to BYU, and every contributor had claimed a deduction for more than the fair market value of his gift.[140] The government argued, and the Tenth Circuit agreed, that this constituted a reasonable basis for believing that BYU's other contributors of gifts in-kind *might* also have overvalued their gifts.[141] The court cited decisions in the Third[142] and Sixth[143] Circuits to support its holding that the test the IRS must meet in order to enforce a John Doe summons is one of "reasonableness," not of certainty.[144]

Pending Supreme Court review of a petition for certiorari, BYU produced the names of the contributors of gifts in-kind, whereupon, pursuant to the procedure mandated by the Supreme Court decision in *United States v. Munsingwear*,[145] the government moved to dismiss the appeal on grounds of mootness.[146] The Supreme Court then vacated the Tenth Circuit's decision and remanded the case for the Tenth Circuit to consider the issue of mootness.[147] The Tenth Circuit then vacated its judgment, withdrew its opinion, and dismissed the appeal.[148] The author has included the discussion of this case not for its precedential value, but rather to illuminate the Tenth Circuit's analysis in this important area of law.

### B. *Limiting Recordkeeper Summonses on Relevancy and Undue Burden Grounds*

In *United States v. Southwestern Bank & Trust Co.*,[149] the Tenth Circuit considered the standards for judicial enforcement of a third-party recordkeeper summons.

#### 1. Standard of Relevancy

In *Southwestern Bank*, the IRS was investigating the 1977-78 tax liability of three individual taxpayers and five corporations in which the individual taxpayers had an ownership interest.[150] Recordkeeper summonses sought bank records, including checks, loan records, and deposit records, pertaining to individual and corporate transactions from February 1, 1976 through May 31, 1979.[151] The IRS asserted a need for the documents in order to determine whether corporate distributions to the individual taxpayers during 1977 and 1978 were properly characterized as dividends or as return of capital.[152] The taxpayers intervened[153] and instructed the bank not to com-

139. *Id.* at 1350.
140. *Id.* at 1349.
141. *Id.* The Tenth Circuit emphasized that the IRS was only required to establish that a taxpayer *might* have failed to comply with the tax laws. *Id.*
142. United States v. Pittsburgh Trade Exch., Inc., 644 F.2d 302 (3d Cir. 1981).
143. *In re* Tax Liability of John Does, 671 F.2d 977 (6th Cir. 1982).
144. 679 F.2d at 1349.
145. 340 U.S. 36 (1950).
146. *See* United States v. Brigham Young Univ., 103 S.Ct. 713 (1983).
147. *Id.*
148. United States v. Brigham Young Univ., No. 80-1508 (10th Cir. April 13, 1983).
149. 693 F.2d 994 (10th Cir. 1982).
150. *Id.* at 995.
151. *Id.*
152. *Id.*

ply with the summons.[154] When the IRS sought judicial enforcement of the summonses, the taxpayers objected on the basis that the information sought was not relevant to the IRS investigation.[155] The district court refused to order enforcement of the entire summons, finding some of the requested records and checks not relevant to the IRS's investigation.[156]

The Tenth Circuit reversed the district court's order denying enforcement in part, holding that a summons seeking records must be enforced upon a showing that the IRS has complied with proper administrative procedures, that the information sought is not in IRS possession, and that the material sought *may* be relevant to a proper purpose.[157] Material is relevant for summons enforcement purposes if it tends to shed light on the accuracy of a taxpayer's return.[158]

An IRS agent testified that the corporate bank records for the entire corporate year would aid the IRS in ascertaining the accuracy of the taxpayers' returns.[159] The court found that this uncontroverted testimony satisfied the relevancy standard, and reversed the district court order denying production of specified corporate records.[160]

The district court's denial of IRS request for production of all checks cashed by taxpayers during the periods in question was mooted on appeal when the intervenors agreed with the government that the materials sought were relevant.[161] The Tenth Circuit pointed out, however, that the judiciary had discretion to limit the required compliance to protect the third-party recordkeeper from excessive burden or expense in complying with the summons.[162] The court then remanded the case to allow the district court to consider appropriate limitations and procedures for enforcing the summons.[163]

## VI. CRITERIA FOR DETERMINING WHETHER PERIODIC PAYMENTS ARE ALIMONY OR PROPERTY SETTLEMENT

At issue in *Gammill v. Commissioner*[164] was whether periodic payments made to an ex-spouse were tax deductible alimony payments or non-deducti-

153. Under I.R.C. § 7609(a)(1) (1982) the person(s) whose records have been summoned is entitled to notice of that fact after service of the summons. Under *id.* § 7609(b)(2) that person is entitled to intervene in any proceeding with respect to enforcement of the summons and to request the recordkeeper not to comply with the summons. If the taxpayer instructs the recordkeeper to withhold the records, the IRS must either obtain the individual's consent or a court order before it can force the recordkeeper to provide the requested information. *Id.*

154. 693 F.2d at 995.

155. *See id.* at 995-96.

156. *Id.* at 995.

157. *Id.* (quoting United States v. City Nat'l Bank & Trust Co., 642 F.2d 388, 389 (10th Cir. 1981) (quoting United States v. Powell, 379 U.S. 48, 57-58 (1964))).

158. 693 F.2d at 996 (citing City Nat'l Bank & Trust Co., 642 F.2d 388, 389 (10th Cir. 1981) (quoting United States v. Davey, 543 F.2d 996, 1000 (2d Cir. 1976))).

159. 693 F.2d at 996.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. 710 F.2d 607 (10th Cir. 1982).

ble installment payments made pursuant to a property settlement.[165]

A. *The Tax Court Decision*

The IRS assessed tax deficiencies against Gammill because he had treated payments to his ex-spouse, Marjorie, as deductible alimony rather than as non-deductible payments pursuant to a property settlement.[166] The Tax Court held that the payments were not alimony but were part of a property settlement, and ordered Gammill to pay the amount of the disallowed deductions.[167] The Tax Court determined the nature of the payments by reference to general characterization principles and by reference to the law of Oklahoma,[168] where the Gammills were divorced.[169] The Tax Court noted that Oklahoma law permitted a court granting a divorce to designate, in the divorce decree, the dollar amount of any periodic payments which were for support.[170] The Tax Court found it significant that language requiring the payments to be regarded as alimony was absent from the Gammills' divorce decree.[171] In light of the language of the decree, the amount of the total payments, and Mrs. Gammill's contribution to the marriage, the Tax Court held that the payments did not constitute alimony.[172]

B. *The Tenth Circuit Decision*

In reviewing the Tax Court's determination, the Tenth Circuit noted that under the Internal Revenue Code payments which are "periodic" and "arise out of a family or marital obligation to support" are includible in the recipient's taxable income,[173] and are therefore deductible as alimony.[174] Since Gammill's payments extended over a period of more than ten years they were periodic.[175] Thus, the issue was whether the payments constituted a support obligation.[176]

In affirming the Tax Court's determination that the payments were a property settlement, rather than a support obligation, the court enumerated five factors as guides to determine the nature of periodic payments made following a divorce: 1) whether there was a fixed sum, 2) whether the payments are related to the obligor's income, 3) whether the payments continue despite the obligee's death or remarriage, 4) whether the obligee gives consideration for the payments, and 5) whether the obligor provides security to

165. *Id.* at 608. Alimony payments are deductible under I.R.C. § 215 (1982).
166. 710 F.2d at 608.
167. Gammill v. Commissioner, 73 T.C. 921, 926 (1980), *aff'd*, 710 F.2d 607 (10th Cir. 1982).
168. 73 T.C. at 926-30.
169. 710 F.2d at 608.
170. 73 T.C. at 927 & n.4 (quoting OKLA. STAT. tit. 12, § 1289(B)(1971) (recodified as amended at OKLA. STAT. tit. 12, § 1289(A)(1981))).
171. 73 T.C. at 927.
172. 73 T.C. at 926.
173. *See* I.R.C. § 71(a)(1982).
174. 710 F.2d at 608-09. *See* I.R.C. § 215 (1982) (providing deduction for alimony payments).
175. 710 F.2d at 609 (1982))
176. *Id.*

ensure payment.[177] If these factors are present, payments are to be considered a property settlement.[178] The Tenth Circuit found the payments to be in satisfaction of a property settlement on the basis of the following facts: 1) at the time of the divorce, the Gammills entered into an agreement entitled "Property Settlement Agreement" under which a lump sum was payable in equal monthly installments over a twenty-year period, 2) the amount was secured by a lien against a portion of stock owned by Mr. Gammill, 3) the divorce decree referred to the lump sum amount as "part of" property and assets set over to Marjorie Gammill, 4) the entire amount unpaid was due upon the death of Gammill or if he was in default more than thirty days, and 5) the property settlement would inure to the benefit of Marjorie's heirs and assigns, should she die prior to the complete payment of all installments.[179]

## VII. CRITERIA FOR DETERMINING TIME OF A STOCK REDEMPTION

In *Barton Theater Co. v. Commissioner*,[180] the Tenth Circuit affirmed the United States Tax Court's determination that a stock redemption had occurred in 1966 rather than, as Barton alleged, in 1967.[181] The court noted that a decision on the timing of the redemption is not fixed by the time the shares are transferred, but is based on a practical consideration of all the facts surrounding a transaction.[182] The factors which persuaded the Tax Court, and the Tenth Circuit, that the redemption took place in 1966 were the presence of: 1) formal agreements covering the redemption and all its details, signed and notorized in January, 1966; 2) 1966 accounting entries on the books of both corporations involved reflecting full consummation of the agreement; 3) audited balance sheets for both corporations reflecting the fact that the redemption was completed in 1966; 4) a 1969 proxy agreement and a 1970 letter declaring that Barton had acquired the shares of Atlas Corporation in January, 1966; and 5) Barton's Board of Directors minutes adopting the stock redemption agreement at a January 1, 1966 meeting.[183] All these factors, stated the court, reflected the intention of the parties that the redemption occur in 1966.[184]

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177. *Id.* at 610. These five factors were first listed in Riley v. Commissioner, 649 F.2d 768 (10th Cir. 1981).

178. 710 F.2d at 610.

179. *Id.* at 608-09.

180. 701 F.2d 126 (10th Cir. 1983).

181. *Id.* at 128.

182. *Id.* The following factors were listed as significant: passage of legal title; transfer of possession; fixed sales price; timing of transfer of consideration; the parties' intention; the language of the agreements; and whether the parties have chosen a particular effective date for the agreement. *See id.*

183. *Id.* at 128-29.

184. *Id.* at 128.

# COMMENT, *UNITED STATES V. PTASYNSKI*: A WINDFALL FOR CONGRESS

## I. INTRODUCTION

> [The power of Congress to collect taxes from the states] is a power, sir, to burden us with a standing army of ravenous collectors—harpies, perhaps, from another state, but who, however, were never known to have bowels for any purpose but to fatten on the life-blood of the people. In an age or two, this will be the case; and when the Congress shall become tyranical, these vultures, their servants, will be the tyrants of the village, by whose presence all freedom of speech and action will be taken away.[1]

This fear, stated so vitriolically in 1787, no doubt constituted a prophecy fulfilled when viewed through the eyes of the plaintiffs challenging the Crude Oil Windfall Profit Tax Act of 1980[2] (Act) in *United States v. Ptasynski*.[3] Substantively, the complaint paralleled the prophecy by accusing Congress of stepping beyond its constitutionally limited power to tax.[4] The Supreme Court, by unanimously reversing the opinion of the United States District Court for the District of Wyoming and upholding the constitutionality of the Act,[5] further extended the already broad discretion of Congress to impose taxes pursuant to its constitutional power. Following *Ptasynski*, Congress may frame an excise tax in geographic terms as long as the geographic classification used does not in fact discriminate against specific geographic areas.[6] This comment will analyze *Ptasynski*'s consistency with previous Supreme Court interpretations of the uniformity clause's[7] limitation on Congress' taxing power, and will discuss the decision's practical and legal consequences.

## II. FACTS OF THE CASE AND THE DISTRICT COURT'S OPINION

### A. *The Alaskan Oil Exemption*

On April 2, 1980, President Carter signed the Crude Oil Windfall Profit Tax Act of 1980,[8] thereby setting into law a means for the federal govern-

1. P. SMITH, THE CONSTITUTION—A DOCUMENTARY AND NARRATIVE HISTORY 242 (1980) (quoting William Symes, delegate to the Massachusetts State Assembly on the ratification of the Constitution).

2. I.R.C. §§ 4986-4998 (1982).

3. 103 S. Ct. 2239 (1983).

4. *See* Ptasynski v. United States, 550 F. Supp. 549, 552 (D. Wyo. 1982), *rev'd*, 103 S. Ct. 2239 (1983).

5. *See* United States v. Ptasynski, 103 S. Ct. 2239 (1983), *rev'g*, 550 F. Supp. 549 (D. Wyo. 1982).

6. *See* 103 S. Ct. at 2245.

7. U.S. CONST. art. I, § 8, cl. 1. This section provides in relevant part that "Congress shall have Power To lay and collect Taxes, Duties, Imports and Excises . . . but all Duties, Imports and Excises shall be uniform throughout the United States." *Id.*

8. Pub. L. No. 96-223, 94 Stat. 229 (codified in scattered sections of 26 U.S.C. (I.R.C.) (1982)).

ment to capture billions of dollars of revenue by taxing the "windfall profit" realized on the production of decontrolled domestic oil.[9] Pursuant to Title I of the Act,[10] different classifications of domestic oil are subject to tax rates ranging from thirty to seventy percent.[11] Each classification, or "tier," contains oil types defined by manner of production, quality of oil, or date production began from a well.[12] Essentially, though, four categories of crude oil exist for purposes of the Act: taxable oil in tiers 1, 2, and 3, and exempt oil.[13] This last category contains six classifications of oil which are exempt from "windfall profits" taxation, one of which is "exempt Alaskan oil."[14] The Alaskan oil exemption is the only exemption delineated solely by geographical terms.[15] For domestic crude oil to be classified as exempt Alaskan oil it must be obtained from a reservoir from which oil is being produced in commercial quantities through a well located north of the Arctic circle, or from a well located on the north side of the divide of the Alaskan-Aleutian Range and at least seventy-five miles from the nearest point on the Trans-Alaska Pipeline System.[16]

### B. *The District Court's Decision*

Six months after the effective date of the Act, independent oil producers brought suit in the United States District Court for the District of Wyoming alleging that the windfall profit tax was unconstitutional.[17] The basis for this claim was the uniformity clause,[18] which prohibits excise taxes (such as

9. The "windfall profit" is the difference between a statutory base price and the higher price at which domestic crude oil can be sold as a result of the gradual decontrol of crude oil prices which began on June 1, 1979. *See* I.R.C. §§ 4988(a), (c)(1), 4989 (1982). This "windfall profit" is the amount the Executive Branch believed would accrue to oil producers once domestic oil was deregulated; both President Carter and the Congress supported the imposition of an excise tax on the production of domestic crude in order to divert the large profits created by decontrol into a national energy program. *See* S. REP. NO. 394, 96th Cong., 2d Sess. 1,1 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 413; H.R. REP. NO. 304, 96th Cong., 2d Sess 2, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 589.

The government estimates that the net windfall profit tax revenue collected on domestic oil from the inception of the tax through the end of the 1987 fiscal year will be approximately 76 billion dollars. Appellant's Jurisdictional Statement at 8, United States v. Ptasynski, 103 S. Ct. 2239 (1983).

10. Title I of the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, §§ 101-103, 94 Stat. 229, 230-56 (codified at I.R.C. §§ 4986-4998, 6076, 6050C, 7421 (1982)).

11. *See* I.R.C. § 4987 (1982).

12. *See id.* § 4991.

13. *See id.*

14. *See id.* § 4991(b)(3). The other categories of exempt oil are: oil from qualified governmental or charitable interests, Indian oil, front-end oil, exempt royalty oil, and exempt stripper well oil. *Id.* § 4991(1), (2), (4)-(6).

15. *Compare id.* § 4994(e) (defining exempt Alaska oil) *with id.* § 4994(a)-(d), (f), (g) (defining other categories of exempt oil).

16. *Id.* § 4994(e). Exempt Alaskan oil does not include production from the Sadlerochit reservoir on the Alaskan North Slope, an area rich in oil reserves and production. *Id. See also id.* § 4996(d)(3).

Legislative history reveals that the Alaska exemption was enacted because Congress was concerned that "taxation of this production would discourage exploration and development of reservoirs in areas of extreme climatic conditions." JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. REP. NO. 817, 96th Cong., 2d Sess. 103 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 642, 656.

17. *See* 103 S. Ct. at 2242.

18. U.S. CONST. art I, § 8, cl. 1.

the windfall profit tax) which are not "uniform throughout the United States."[19] Plaintiffs claimed that inclusion of the Alaskan oil exemption precluded the geographical uniformity required of an excise tax, rendering the Act unconstitutional and entitling them to a refund of windfall taxes already paid.[20]

On cross-motions for summary judgment, the court concluded the issues were ripe for review[21] and held that the "exempt Alaskan oil" provision rendered the Windfall Profit Tax Act unconstitutional when measured against the uniformity clause.[22] The court recognized Congress' extensive power to tax, but held that geographical uniformity, the constitutional limitation expressly and "unequivocally" applicable to excise taxes, was violated by the Alaskan oil exemption.[23] Although the production and removal of crude oil did not take place at the same time or in the same fashion in every state, that fact was irrelevant because the uniformity clause's underlying principle of geographical uniformity required that the Act operate "with the same force and effect in every place where the subject of it is found."[24] The court concluded that the subject of the Act was the removal of domestic crude oil,[25] and that the uniformity clause required that the removal of crude oil be taxed at the same rate regardless of where that activity took place.[26] The Act violated this requirement because "[t]he Act, on its face, says that one state, Alaska, is not subject to the same tax, at the same rate as all the other states."[27]

The district court rejected the United States' contention that a "rational justification" for the Alaskan oil exemption supported its validity.[28] The court emphasized that to be legitimate, an exemption from a tax must satisfy constitutional requirements.[29] Because the proposed exemption would violate the constitutional requirement of geographical uniformity,[30] the proposed exemption was constitutionally unacceptable.[31]

The court also rejected the United States' alternative argument that

19. *See supra* note 7. *See* Ptasynski v. United States, 550 F. Supp. 549, 552 (D. Wyo. 1982), *rev'd*, 103 S. Ct. 2239 (1983).

20. Ptasynski v. United States, 550 F. Supp. 549, 552 (D. Wyo. 1982), *rev'd*, 103 S. Ct. 2239 (1983). Plaintiffs also alleged that the Act was an unconstitutional taking, and was irrational legislation violating the due process clause of the fifth amendment, U.S. CONST. amend. V, cl. 4. 550 F. Supp. at 552. These issues were not decided by either the district court, *id.* at 555, or the Supreme Court, *see* 103 S. Ct. at 2240.

21. The United States contended that because no exempt Alaskan oil had been produced during the period for which the refund was requested, the windfall profit tax had been uniformly applied during the relevant time frame. The court rejected that argument and said that the absence of production was irrelevant. Rather, "[t]he lack of uniformity, in the Act itself, exists now, and has existed since the Act was passed. This alone is sufficient for a finding that the controversy before the Court is now appropriate for adjudication." 550 F. Supp. at 552.

22. *Id.* at 553.

23. *Id.*

24. *Id.* (quoting The Head Money Cases, 112 U.S. 580, 584 (1884)).

25. 550 F. Supp. at 553.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *See supra* notes 22-27 and accompanying text.

31. 550 F. Supp. at 553.

even if inclusion of the exempt Alaskan oil provision violated the uniformity clause, that provision was severable, allowing the remaining sections of the Act to stand as constitutionally valid.[32] The government maintained that the general separability clause set forth in section 7852(a) of the Internal Revenue Code[33] effected the validity of the remaining provisions in the Act.[34] The court observed that it would have given a separability clause specifically written into the Act "more deferential consideration,"[35] but held that the general separability clause did not itself provide a suitable basis upon which the rest of the Act could stand.[36] The court invoked legislative intent as the acid test determinative of the exemption's separability,[37] and concluded that because the Act would not have been passed without the constitutionally infirm provision intact, the Act was void in its entirety.[38]

The district court stayed the effect of its adjudication awaiting appellate consideration.[39] Hence, no refunds were issued to plaintiffs and the windfall profit tax continued to be collected pendente lite until a higher court ruled upon the correctness of the trial court's decision.[40]

## III. THE SUPREME COURT DECISION

On direct appeal,[41] the Court reversed the district court and held the Act constitutional.[42] In reversing the district court's opinion, the Court sanctioned the government's argument that Congress' decision to characterize apparently similar activities as distinctive for taxation purposes is an important factor when considering a tax's constitutionality under the uniformity clause.[43] The Court held that the relevant inquiry under the

32. *See id.* at 555.

33. I.R.C. § 7852(a) (1982). This section provides that "[i]f any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby." *Id.*

34. 550 F. Supp. at 554.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* The court stated:

> [I]t is . . . clear that the Alaska exemption was the result of negotiations and compromise, and that the Act as it exists today would not have been passed without the invalid Alaska provision.
>
> . . . [T]he exemption does carry sufficient import to justify a finding that its invalidation renders the entire Act void.

*Id.* at 554-55.

The court also cited another basis for its decision, the impermissibility of judicial legislation. If the Act was permitted to stand, the tax would have extended to all crude oil producers in Alaska, which was a decision legislative in nature and beyond the scope of the judicial function. *Id.* at 555.

39. *Id.* at 556.

40. *See* Appellant's Jurisdictional Statement at 7 n.11, United States v. Ptasynski, 103 S. Ct. 2239 (1983) (setting forth the Court's final amended judgment).

41. The Supreme Court possessed jurisdiction over this case by virtue of 28 U.S.C. § 1252 (1982). This statute authorizes an appellant to appeal directly to the Court from a final judgment of a United States court which holds an Act of Congress to be unconstitutional in a civil action to which the United States is a party. *Id.*

42. United States v. Ptasynski, 103 S. Ct. 2239 (1983), *rev'g* 550 F. Supp. 549 (D. Wyo. 1982).

43. *See* 103 S. Ct. at 2245-46.

uniformity clause is not the words used to describe a tax classification, but is whether "actual geographic discrimination" occurs when the classification is framed in geographic terms.[44] Therefore, although Congress may frame an excise tax classification in geographic terms, it must still adhere to the stricture that the tax must, in fact, operate with uniform effect in every state where the subject of the tax is found.[45]

The Court's rationale was dependent on both prior uniformity clause decisions, and on its recent interpretations of the uniformity requirement in the bankruptcy clause.[46] The Court began its analysis by observing that the *Head Money Cases*[47] and analogies had established beyond peradventure the basic contours of uniformity clause analysis.[48] At issue in the *Head Money Cases* was the constitutionality of a duty levied against transportation companies carrying foreign passengers entering the United States by boat.[49] Plaintiffs argued that unless the tax was also applied to foreign passengers entering the United States by railroad or other land transport the tax was unconstitutional for failing to operate with intrinsic equality, *i.e.* for failing to act uniformly on all states and on all persons engaged in the business of transporting passengers.[50] The Court squarely rejected this argument by ruling that although an excise tax might operate unequally and thus be intrinsically disparate, a tax was constitutionally uniform when it operated "with the same force and effect in every place where the subject of it is found."[51] Defining the "subject" of the tax was, without question, the prerogative of Congress.[52] Consequently, although geographical considerations played a role in determining which foreign passengers were to be subject to taxation,[53] the tax was constitutional because it operated with precisely the same effect in every place in the United States where the subject of the tax (foreign passengers arriving by sea) was found.[54]

In light of the principles of geographic uniformity and congressional discretion announced in the *Head Money Cases* and reaffirmed in *Knowlton v. Moore*,[55] the Court framed the issue in *Ptasynski* as whether the uniformity clause precluded the use of geographical terms to define a class of taxable

44. *Id.* at 2245.

45. *Id.*

46. U.S. CONST. art. I, § 8, cl. 4 provides that Congress shall have the power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

47. 112 U.S. 580 (1884).

48. *See* 103 S. Ct. at 2244.

49. 112 U.S. at 589.

50. Argument for Cunard Steamship Co., The Head Money Cases, 112 U.S. 580, 583-84 (1884).

51. 112 U.S. at 594.

52. *See id.* at 595 (citing State Railroad Tax Cases, 92 U.S. 575, 612 (1875) (holding that in enacting tax statutes legislatures can draw distinctions between apparently similar classes)). *Accord* Nicol v. Ames, 173 U.S. 509, 521 (1899) (under the uniformity clause, classifications are valid when they are based on reasonable ground and are not "arbitrary, based upon no real distinction and entirely unnatural").

53. *See* 112 U.S. at 594 (recognizing that the "evil to be remedied . . . has no existence on our inland borders, and immigration in that quarter needed no such regulation").

54. *Id.*

55. 178 U.S. 41 (1900).

activities.[56] Although dictum in *Downes v. Bidwell*[57] unequivocally stated that the uniformity clause proscribed tax statutes explicitly limiting their operation to a specified geographic area,[58] the Court chose not to follow *Downes*.[59] Having eliminated *Downes* as controlling precedent, the Court acknowledged that although the purposes underlying the uniformity and bankruptcy clauses were "not identical," the Court would look to the interpretation of one to aid in the interpretation of the other.[60]

The *Regional Rail Reorganization Act Cases*[61] (*3R Act Cases*) were invoked for the proposition that Congress may resolve geographically isolated problems by enacting legislation applicable to only one region of the country.[62] In the *3R Act Cases* one of the issues was whether a reorganization statute,[63] which subjected bankrupt railroads undergoing reorganization in a specified geographical region[64] to a unique set of reorganization laws,[65] violated the uniformity requirement of the bankruptcy clause.[66] The Court held that the statute did not violate the uniformity requirement because there was no pending railroad reorganization proceeding outside the defined region during the period that the Act applied.[67] Thus, the Act in fact operated uniformly throughout the United States upon all members of the class of debtors and creditors affected: no creditor's right to obtain relief was restricted by the regional limitation.[68]

In explaining its decision to allow the legislation to stand despite the limited class of debtors and creditors affected and despite the reorganization act's limited geographic scope, the Court stated that the uniformity requirement did not deny Congress the power to take into consideration the differences that exist between different parts of the country when it attempts to tailor bankruptcy legislation to resolve geographically isolated problems.[69] The *Head Money Cases* were cited to support this conclusion;[70] the Court read

56. 103 S. Ct. at 2244. *See also id.* at 2245 (observing that the Alaskan exemption was merely a geographic description of an otherwise permissible tax classification).

57. 182 U.S. 244 (1901).

58. *Id.* at 249 (Brown, J., concurring). In *Downes* the Court was asked to consider whether the Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended in scattered sections of 48 U.S.C.), which imposed a duty only on goods brought into the United States from Puerto Rico and vice versa, was violative of the uniformity clause. The Court upheld the tax, without a majority opinion, on the ground that for purposes of the uniformity clause Puerto Rico was a territory and therefore not a part of the United States. *See generally* 182 U.S. at 247 (Brown, J., concurring); *id.* at 287 (White, J., concurring); *id.* at 345 (Gray, J., concurring). Justice Brown's statements in *Downes* are therefore clearly dictum.

59. *See* 103 S. Ct. at 2244 n.12.

60. *Id.* at 2244 n.13.

61. 419 U.S. 102 (1974).

62. 103 S. Ct. at 2245.

63. Regional Rail Reorganization Act, 45 U.S.C. §§ 701-794 (1982).

64. *See id.* § 702(17).

65. *See id.* § 717; *3R Act Cases*, 419 U.S. at 109-10.

66. 419 U.S. at 122. For text of the bankruptcy clause, *see supra* note 46.

67. *Id.* at 159-60. The Act's exclusive reorganization provisions could only be applied for a 180-day period following the Act's effective date. *See* 45 U.S.C. § 717(b) (1982).

68. 419 U.S. at 160. *Cf.* Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 471 (1982) (legislation affecting only creditors of a single railroad violated the uniformity requirement of the bankruptcy clause).

69. 419 U.S. at 161.

70. *See id.* at 160 (citing The Head Money Cases, 112 U.S. 580 (1884)).

the *Head Money Cases* as interpreting the uniformity clause to permit geographically restricted legislation.[71] Because the Rail Act was also designed to solve a geographically limited "evil," and had in fact been applied uniformly to all persons falling within its purview, the mere use of a geographic term did not violate the uniformity requirement of the bankruptcy clause.[72]

Applying the principles of the *Head Money Cases* and the *3R Act Cases* to the Alaskan exemption, the Court held that the use of a geographical term to describe the subject of an exemption did not violate the uniformity clause.[73] The Court pointed to legislative history which showed that there were unique technological and ecological problems associated with drilling for oil in certain regions of Alaska.[74] Congress was responding to a "geographically isolated problem,"[75] and enacted an exemption for oil wells subject to the identified problems. Those wells were located above the Arctic Circle, or north of the Alaskan-Aleutian Range and 75 miles from the nearest point on the Trans-Alaskan Pipeline.[76] Because no other subjects which fell into this category existed in any other state, the Act did not discriminate between places where the subject of the classification was found. Therefore, the geographic uniformity test as articulated in the *Head Money Cases* had been met and it mattered not that Congress had used a geographic term to identify the tax classification; the classification was constitutional because its application was *in fact* geographically uniform.[77] The end result was couched in cautious terms, however. While the uniformity clause permits Congress "wide latitude in deciding what to tax and does not prohibit it from considering geographically isolated problems,"[78] geographically-framed tax classification must be examined "closely" to see if a classification reflects "actual geographic discrimination."[79]

## IV. ANALYSIS

### A. *Introduction*

By upholding the validity of a geographically-described tax classification, *Ptasynski*—to the federal government's immense relief—put the Court's stamp of approval on the collection of enormous amounts of revenue. The government estimated that the net windfall profit tax revenues would exceed twenty-six billion dollars by the end of the 1982 fiscal year and that approximately fifty billion dollars in net revenues would be collected during the

71. *See* 419 U.S. at 161 (citing The Head Money Cases, 112 U.S. at 594 (recognizing that the "evil" addressed by statute was geographically limited)).

72. 419 U.S. at 161.

73. 103 S. Ct. at 2245.

74. *Id.* at 2242 (citing JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, H.R. REP. NO. 817, 96th Cong., 2d Sess. 103 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 642, 656).

75. *See* 103 S. Ct. at 2245 n.14.

76. *See id.* at 2245.

77. *Id.* The Court stated: "[h]ad Congress described this class of oil in nongeographic terms, there would be no question as to the Act's constitutionality. We cannot say that identifying the class in terms of its geographic boundaries renders the exemption invalid." *Id.* at 2246.

78. *Id.* at 2245.

79. *Id.*

fiscal years of 1983-1988.[80] This section, while noting the practical political considerations which may have played a role in the Court's decision, will concentrate on the decision's legal analysis.

### B. *Geographic Uniformity Requirements in the Uniformity and Bankruptcy Clauses: The Problems with* Ptasynski

#### 1. The Bankruptcy Clause is not Analogous to the Uniformity Clause

The Court in *Ptasynski* agreed that the general purpose of the uniformity clause is to limit the federal government's exercise of its commerce power.[81] Conversely, the purpose giving rise to the bankruptcy clause was the protection of discharged debtors in the federation of states.[82] Thus, the bankruptcy clause is a measure designed to *facilitate*, rather than limit, Congress' power to promote commerce between states with different laws.[83] A fortiori, the interpretation of one clause as a guideline for the interpretation of the other is not altogether desirable.

While it is natural that the uniformity requirement in the bankruptcy clause has been construed liberally in light of the clause's purpose,[84] it is not proper to assume that the parameters of that clause's uniformity requirement conform with those of a uniformity requirement imposed as an express limitation on Congress' power to tax. The fact that Congress may "fashion legislation to resolve geographically isolated problems" when enacting bankruptcy laws, as long as the effect of the legislation is uniform throughout the country,[85] comports with the broad construction of the clause needed to accommodate American commercial needs. The flexible standard of construction appropriate for the bankruptcy clause does not necessarily withstand

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80. *See supra* note 9.

81. 103 S. Ct. at 2243 (citing Knowlton v. Moore, 178 U.S. 41, 103-06 (1900); 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 417-18 (rev. ed. 1937)).

82. *See* Nadelman, *On the Origin of the Bankruptcy Clause*, 1 AM. J. LEGAL HIST. 215, 224-25 (1957) (comprehensive review of the history and purpose of the bankruptcy clause).

83. *E.g.*, THE FEDERALIST No. 42, at 271 (J. Madison) (C. Rossiter ed. 1961). Madison's discussion of the clause, in its entirety, reads:

> The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states, that the expediency of its seems not likely to be drawn into question.

*Id.*

84. *See* Regional Rail Reorganization Act Cases, 419 U.S. 102, 158-59 (1974) (the Court recognized the "flexibility inherent in the . . . provision" and stated that "the uniformity clause was not intended 'to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions.' " (quoting *In re* Penn Central Transp. Co., 384 F. Supp. 895, 915 (Sp. Ct. R.R.R.A. 1974)); Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry. Co., 294 U.S. 648, 668 (1935) ("[f]rom the beginning, the tendency of legislation and . . . judicial interpretation has been uniformly in the direction of progressive liberalization . . . of the bankruptcy power"); Sturges v. Crowninshield, 17 U.S. (4 Wheat) 122, 195 (1819) ("[t]he bankrupt law is said to grow out of the exigencies of commerce . . . (i)t is . . . (a subject) on which the legislature may exercise an extensive discretion").

85. *Compare* Regional Rail Reorganization Cases, 419 U.S. 102, 158-61 (1974) (upholding statute giving equal treatment to similarly situated classes of creditors and debtors) *with* Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 471 (1982) (striking down statute giving special treatment to one segment of a group of similarly situated creditors).

constitutional muster when applied to the uniformity clause, however. As revealed by the clause's legislative history, the Framers were concerned that either one state or a combination of states might muscle their industries (vis-a-vis congressional intervention) into a position of power at the expense of another state's industries.[86] To prevent that situation from occurring, the uniformity clause was enacted expressly to limit Congress' ability to impose indirect taxes upon targeted regions or states.[87] The purpose and history of the clause therefore reveal an intention to make the limitation on Congress' taxing power absolute, without any circumstances suggesting the necessity or propriety of an "inherent flexibility" in its application. Historically, rulings by the Court have embodied this strict construction without exception, including the *Head Money Cases* so heavily relied upon by the *Ptasynski* Court.[88]

2. *Ptasynski* is not Justified by Existing Uniformity Clause Precedent

The Court in *Ptasynski* correctly cited the *Head Money Cases* for the proposition that an excise tax must apply at the same rate throughout the United States wherever the subject of the tax is found.[89] The Court then decided that three significant factors reconciled the Alaskan exemption with the rule of the *Head Money Cases*: 1) the Alaskan classification, although classified in geographic terms, did not encompass the whole of Alaska;[90] 2) no other subjects of the group were found to exist in any other state;[91] and 3) the effect of the statute in the *Head Money Cases* was to distinguish between geographic regions, thereby giving that practice the imprimatur of constitutionality.[92]

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86. *See* C. WARREN, THE MAKING OF THE CONSTITUTION 570-74 (2d ed. 1937). See also 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 428 (1st ed. 1833):

> [The purpose of the clause] was to cut off all undue preferences of one state over another in the regulation of subjects affecting their common interests. Unless . . . excises were uniform, the grossest and most oppressive inequalities, vitally affecting the pursuits and employments of the people of different states, might exist. The agriculture, commerce or manufacture of one state might be built upon the ruins of those of another; and a combination of a few states in congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favoured neighbors.

*Id.*

87. 2 J. STORY, *supra* note 86, at 428. Mr. Justice Story's interpretation of the uniformity clause echoed a statement made by North Carolina's Hugh Williamson after the ratification debates:

> The clear and obvious intention of the (uniformity clause) . . . was, that Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another . . . . I do not hazard much in saying, that the present constitution had never been adopted without th[is] preliminary [guard] in it.

3 ANNALS OF CONG. 379 (1792).

88. *See* 103 S. Ct. at 2244.

89. *See Head Money Cases*, 112 U.S. at 589, *quoted in* 103 S. Ct. at 2244.

90. *See* 103 S. Ct. at 2246.

91. *See id.* at 2241-42. The Court noted that certain exempt Alaskan oil was located in offshore territorial waters not part of Alaska, and that the exemption was therefore not drawn along "state political lines." *Id.* at 2242. Because Congress' taxing power is not subject to the uniformity clause when applied to activities outside the United States, Downes v. Bidwell, 182 U.S. 244 (1901); Mercury Press v. District Court, 173 F.2d 636 (D.C. Cir. 1948), the practical effect of the exemption, for purposes of applying the uniformity clause, was to exempt only oil found within Alaskan borders.

92. 103 S. Ct. at 2244.

In this case the subjects of the Windfall Profit Tax Act were different classifications of domestic crude oil, one of which was "exempt Alaskan oil."[93] One cannot quarrel with the conclusion that because the subject of the classification was contained solely within Alaska, the tax operated with "geographic uniformity." Such an approach, however, appears to beg the question; by precise definition of classifications taxes can be restricted to particular states, with geographical uniformity following as a necessary result of the classification.

Further, although the uniformity clause does not bar Congress from choosing as a subject of a tax an activity which, as a matter of geographical locus, exists only in certain states[94] (as long as the requirement of geographic uniformity is met), it seems to violate the purpose of the uniformity clause to allow the subject of a tax or exemption to be chosen *because* of its geography. Thus, the reasoning used in *Ptasynski*, although superficially consistent with prior uniformity clause limitations, appears on a deeper level to deviate from prior decisions.

### 3. *Ptasynski*'s "Rational Justification" Test Must Include a Substantive Standard

A most critical development in *Ptasynski* was the Court's implied acceptance of Congress' "rational justification" for a geographical designation as a standard for measuring the constitutionality of a tax under the uniformity clause.[95] Prior uniformity clause opinions have examined legislative considerations in order to arrive at "the evil to be remedied" by an indirect tax, but have always based their determination of a tax's constitutionality solely on whether the tax adheres to the principle of geographic uniformity.[96] Neither the legislative history nor purpose of the clause suggest that legislative considerations are permitted to justify the imposition of geographically non-uniform taxes. Deference to congressional consideration, however, clearly played a significant role in the outcome of *Ptasynski*,[97] and it is reasonable to conclude that the "rational justification" test will assume increasing importance in future decisions involving the uniformity clause.

The importance attributed by the Court to congressional considerations in *Ptasynski* is reminiscent of the deference with which Congress' rational justification is treated in cases dealing with the constitutionality of legislation challenged as violating equal protection guarantees. A fundamental distinction exists, however, between the constitutional restrictions imposed through the uniformity and equal protection clauses. The uniformity clause requires that geographic uniformity be used as the exclusive standard to test

93. *See supra* notes 10-16 and accompanying text.

94. Knowlton v. Moore, 178 U.S. 41,109 (1900).

95. *See* 103 S. Ct. at 2246 (where Congress has exercised its "considered judgment" in determining proper classifications in a complex field, the Court is reluctant to overturn a congressional decision).

96. *E.g.*, Florida v. Mellon, 273 U.S. 12 (1927); Knowlton v. Moore, 173 U.S. 41 (1900); The Head Money Cases, 112 U.S. 580 (1884).

97. *See* 103 S. Ct. at 2244 (the uniformity clause does not restrict congressional power to draw tax classifications); *id.* at 2246 (the Court is reluctant to disturb congressional classifications addressing complex taxation problems).

the constitutionality of an arguably rational indirect tax.[98] The equal protection clause only requires that a classification scheme have some arguable relation to the purpose for which it is made "and does not contain the kind of discrimination against which the equal protection clause affords protection."[99] The uniformity clause, unlike the equal protection clause, therefore includes a substantive standard against which congressional exercise of the taxing power must be measured. The Court's treatment of that standard as practically analagous to the equal protection standard subverts the purpose of the uniformity clause.

## V. CONCLUSION

The major legal consequence arising out of *Ptasynski* is an expansion of Congress' power to impose indirect taxes. Concededly, the ability of Congress to frame tax classifications in geographic terms may not be a benefit of enormous magnitude, given the Court's statement that it will scrutinize the practical application of the tax to prevent geographic discrimination.[100] The practical advantages of this new rule, however, are exemplified by the billions of dollars in revenue which Congress is now able to reap despite the faulty draftsmanship which endangered the Act and its operation.

*Ptasynski* also leaves Congress less encumbered in its taxing power as a consequence of the Court's reluctance to review legislative decisions. The Court's deference has spawned a rational basis test of sorts which will very likely be significant in future uniformity clause challenges. Essentially, the interests of the congressional majority may now play a determinative role in the outcome of such challenges.

Finally, *Ptasynski* left no doubt that the Court will continue to apply the liberally construed uniformity standard of the bankruptcy clause to uniformity clause cases. This trend will be responsible for a movement away from the absolute geographic uniformity requirement which has characterized the uniformity clause standard in the past.

*Ellen Eggleston*

98. *E.g.*, Knowlton v. Moore, 178 U.S. 41 (1901); The Head Money Cases, 112 U.S. 580 (1884).

99. Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

100. 103 S. Ct. at 2245.

# UNITED STATES SUPREME COURT REVIEW OF APPELLATE AND DISTRICT COURT DECISIONS

## TENTH CIRCUIT DECISIONS

### I. *NEW MEXICO V. MESCALERO APACHE TRIBE*—AFFIRMED

In *New Mexico v. Mescalero Apache Tribe*,[1] the Supreme Court unanimously affirmed the Tenth Circuit's decision[2] that the application of New Mexico's game licensing laws to on-reservation hunting and fishing by non-members[3] of the Mescalero Apache tribe (Tribe) was preempted by the operation of federal law.[4]

The Supreme Court's holding was based on evidence that the governing body of the Tribe, working closely with the federal government under the authority of federal law, had exercised its lawful authority to develop and manage the reservation's fish and game resources for the benefit of Tribal members.[5] In light of the Tribe's unquestioned authority to regulate the use of its own resources by members and non-members,[6] the state did not have exclusive jurisdiction over licensing game activities on Tribal lands.[7] Weighing the federal interest reflected in the comprehensive tribal game management program established pursuant to federal law[8] against the state's attenuated interests in licensing game activities on Tribal lands, concurrent jurisdiction was precluded.[9] Hence, the state laws were preempted.[10] Although the precise issues presented in this decision seem relatively unimportant, the Court's decision clearly reflects its commitment to determine the difficult issues raised in claims of concurrent jurisdiction by carefully balancing the interests of each of the concerned parties.

#### A. *Background*

With the aid of extensive federal assistance and supervision, the Tribe has established a comprehensive scheme for managing reservation fish and

1. 103 S. Ct. 2378 (1983).
2. Mescalero Apache Tribe v. New Mexico, 677 F.2d 55 (10th Cir. 1982), *aff'd*, 103 S. Ct. 2378 (1983). The Supreme Court vacated the Tenth Circuit's original opinion in this litigation for reconsideration in light of Montana v. United States, 450 U.S. 544 (1981). *See* New Mexico v. Mescalero Apache Indian Tribe, 450 U.S. 1036 (1981), *vacating* 630 F.2d 724 (10th Cir. 1980).
3. Both the Tenth Circuit and the Supreme Court occasionally interchange the terms "non-members" and "non-Indians". The important distinction, however, is between Tribal members and non-members, including non-Mescalero Indians. Mescalero Apache Tribe v. New Mexico, 630 F.2d 724, 726 n.1 (10th Cir. 1980), *vacated*, 450 U.S. 544 (1981).
4. 103 S. Ct. at 2381, 2391.
5. *See id.* at 2386-91.
6. *Id.* at 2387-88.
7. *Id.* at 2388.
8. *See id.* at 2387-89.
9. *Id.* at 2391.
10. *Id.*

wildlife resources.[11] Tribal ordinances, subject to approval by the Secretary of the Interior, carefully regulate the conditions under which both tribal members and non-members may fish and hunt so as to attend to the necessary conservation needs of reservation wildlife.[12] Frequently, New Mexico's fishing and gaming regulations have conflicted with the tribal regulations.[13] New Mexico, through its Department of Game and Fish, sought to enforce its regulations by arresting hunters[14] possessing game killed on the reservation in violation of state hunting regulations.[15]

In 1977,[16] the Tribe, seeking to prevent state regulation of on-reservation hunting and fishing, filed suit against New Mexico in the United States District Court for the District of New Mexico, asking for declaratory and injunctive relief.[17] The United States Court of Appeals for the Tenth Circuit affirmed the district court's order enjoining the state from applying its game laws to Tribal lands.[18] Following New Mexico's petition for a writ of certiorari, the Supreme Court vacated the Tenth Circuit's judgment[19] and remanded the case for reconsideration in light of *Montana v. United States*.[20] On remand, the Tenth Circuit once again held that New Mexico did not have jurisdiction to regulate hunting and fishing on the tribal lands.[21] The Supreme Court then granted certiorari and affirmed the Tenth Circuit.[22]

### B. *The Tenth Circuit's Decision on Remand*

On remand, the Tenth Circuit found that *Montana v. United States*[23] was inapposite. *Montana* addressed the question of an Indian tribe's power to

11. *Id.* at 2382. For example, development of the reservation's fishing and wildlife resources has taken place through stocking fishing ponds, establishing a federal fish hatchery on the reservation, and managing and developing a herd of elk donated by the National Park Service. *Id.* The Tribe has also constructed a large resort complex financed principally with federal funds. *Id.* at 2382 n.3.

12. The Tribal Council, after consultation with professional conservationists, annually adopts hunting and fishing ordinances pursuant to the Tribal constitution. These ordinances have always been approved by the Secretary of the Interior. *Id.* at 2383.

13. For example, the Tribe permits both a buck and a doe to be killed; the state permits only a buck to be killed. The Tribe, unlike the state, permits the purchase of an elk license in two consecutive years. Additionally, Tribal seasons for both hunting and fishing do not always coincide with state imposed seasons. Finally, Tribal ordinances have specified that state hunting and fishing licenses are not required by members or non-members who hunt and fish on the reservation. *Id.*

14. It is unclear whether only non-Indians (as opposed to non-members) were arrested. *See supra* note 3.

15. 103 S. Ct. at 2383.

16. Prior to 1977, the Tribe had consented to the state's application of its hunting and fishing regulations to the reservation. *Id.* at 2383 n.10. As the Tribe sought to create an extensive tourism program to attract income and create employment on the reservation, it became clear that the state's regulations could adversely affect that plan. Mescalero Apache Tribe v. New Mexico, 630 F.2d 724 776 (10th Cir. 1980), *vacated*, 450 U.S. 544 (1981).

17. 103 S. Ct. at 2383.

18. Mescalero Apache Tribe v. New Mexico, 630 F.2d 724 (10th Cir. 1980), *vacated*, 450 U.S. 1036 (1981).

19. New Mexico v. Mescalero Apache Tribe, 450 U.S. 1036 (1981).

20. 450 U.S. 544 (1981).

21. Mescalero Apache Tribe v. New Mexico, 677 F.2d 55 (10th Cir. 1982), *aff'd*, 103 S. Ct. 2378 (1983).

22. New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983).

23. 450 U.S. 544 (1981).

regulate hunting and fishing on reservation land which had been transferred, in fee, to non-members of the tribe.[24] The Court held that neither treaty nor statute had granted the tribe such powers,[25] and that the non-members' hunting and fishing activities were not of a type justifying the exercise of the tribe's inherent sovereign power.[26] Hence, the tribe did not have authority to regulate game activities on alienated land even though that land was within reservation boundaries.[27] The Tenth Circuit found *Mescalero* readily distinguishable from *Montana* because over ninety-nine percent of the lands subject to tribal regulation in *Mescalero* were owned by the Tribe.[28]

After rejecting the application of *Montana*, the Tenth Circuit noted that subsequent to *Montana* the Court had decided *Merrion v. Jicarilla Apache Tribe*.[29] *Merrion*, in holding that the Jicarilla Apache Tribe had the power to tax non-Indians doing business on the reservation, recognized that a tribe's sovereign authority included the power to control economic activity on tribal lands.[30] Because the Tribe's fishing and hunting ordinances related to economic activities conducted on Tribal lands, the Tenth Circuit held that *Merrion*, and not *Montana*, was the controlling precedent.[31] In light of the state's demonstrated lack of interest in the Tribe's economic development, and the interference with that development which would have resulted from permitting state regulation, the Tenth Circuit held that there was no basis for concluding that New Mexico had the power to interfere with the Tribe's power to regulate economic activity conducted on Tribal lands.[32] The Tenth Circuit therefore reaffirmed the district court's grant of injunctive and declaratory relief.

### C. *The Supreme Court's Opinion*

The Supreme Court, having earlier remanded the case for reconsideration in light of *Montana v. United States*, agreed with the Tenth Circuit that *Montana* was not controlling. Unlike *Mescalero*, *Montana* concerned land within the tribal reservation owned in fee simple by non-Indians.[33] The Court in *Montana* held only that the Crow Tribe could not prohibit hunting and fishing by non-members on reservation land no longer owned by the

24. *Id.* at 557.
25. *Id.* at 557-63.
26. *Id.* at 563-65.
27. *See id.* at 557, 567.
28. 677 F.2d at 57 & n.1.
29. 455 U.S. 130 (1982).
30. *See id.* at 141-44.
31. 677 F.2d at 57.
32. *Id.* The court stated:

> Dual regulation of the use of these resources would interfere with the Tribe's efforts to manage, preserve, and improve wildlife resources on its reservation. The state, therefore, cannot interfere by attempting to control non-Indian hunting and fishing conducted exclusively on reservation land held by the Tribe any more than it could do so if the activities in question took place in one of New Mexico's neighboring states.

*Id.*

33. 103 S. Ct. at 2384.

tribe.[34] Thus, *Montana* had not considered whether a state could exercise concurrent jurisdiction over the hunting and fishing activities of non-members on Indian-owned reservation land.[35]

The Court then acknowledged that it has long ago departed from the exclusive tribal sovereignty concept reflected in its early *Worcester v. Georgia*[36] decision. In *Worcester*, the Court had recognized Indian tribes as sovereign nations—independent governments, within whose boundaries state laws "can have no force."[37] The Court's review of decisions following *Worcester* revealed that those decisions had clearly limited the scope of tribal sovereignty,[38] and had recognized a state's authority to exercise concurrent jurisdiction over the on-reservation activities of non-members unless state jurisdiction was preempted by federal law[39] or conflicted with a tribe's inherent sovereign power.[40] In *White Mountain Apache Tribe v. Bracker*,[41] the Court emphasized that the presence of federal preemption does not depend "on mechanical or absolute conceptions of state or Tribal sovereignty."[42] Rather, the presence of federal preemption is determined by a "*particularized inquiry* into the nature of the state, federal, and Tribal interests at stake."[43]

Inquiring into the federal and Tribal interests first, the Court's preemption inquiry focused on the strong federal policy of encouraging Tribal self-sufficiency and self-government;[44] federal laws embodying Congress' intent that the Secretary of the Interior and the Tribal Council manage reservation resources;[45] and the Tribal interest in self-government as reflected by its con-

34. *See* 450 U.S. at 557-67. *Accord* 103 S. Ct. at 2384.

35. 103 S. Ct. at 2384.

36. 31 U.S. (6 Pet.) 515 (1832).

37. *Id.* at 561.

38. A tribe's power to prescribe the conduct of tribal members remains unquestioned. 103 S. Ct. at 2385. Absent governing congressional acts, a state's actions may not infringe on those rights. *Id.* Tribes have been implicitly divested of their exclusive sovereignty because of their dependent status, however. *Id.*; *see, e.g.*, Oliphant v. Susquamish Indian Tribe, 435 U.S. 191 (1978) (Indians have no criminal jurisdiction over crimes committed by non-members within the reservation's boundaries); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-68 (1974) (possessory right of Indian tribes to their aboriginal lands is a matter of federal law, extinguishable only with federal consent). Under certain circumstances, states may validly exercise jurisdiction over on-reservation activities of non-members. *See, e.g.*, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (imposition and enforcement of state's cigarette excise tax to non-Indians on a reservation is valid); Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) (state may require Indian proprietor of on-reservation "smoke-shops" to add cigarette sales or excise tax to articles sold to non-Indians). Furthermore, under exceptional circumstances, states may even exercise jurisdiction over the on-reservation activities of tribal members. *See, e.g.*, Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, 175 (1977) (state may regulate the on-reservation activities of tribal members who exercise their right to take steelheads (fish) from the waters passing through the reservation when that right must be exercised "in common with all citizens of the Territory").

39. 103 S. Ct. at 2385. *Accord* Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1982).

40. 103 S. Ct. at 2386 n.16.

41. 448 U.S. 136 (1980).

42. *Id.* at 145.

43. *Id.* (emphasis supplied).

44. *See* 103 S. Ct. at 2387. *See, e.g.*, 25 U.S.C. § 476 (1982) (vesting power to manage reservation's resources in tribal council selected pursuant to tribal constitution).

45. *See* 103 S. Ct. at 2388 (citing 18 U.S.C. § 1162(b)(1982) (criminalizing entry on Indian lands for purpose of hunting, fishing, or trapping without tribal consent); 25 U.S.C.

stitution, ordinances, and particularly by its clearly established intention and ability to manage, preserve, and improve reservation wildlife for purposes of economic self-sufficiency.[46] The Court noted that concurrent jurisdiction would effectively nullify the Tribe's jurisdiction to regulate its own reservation wildlife, because such dual jurisdiction would effectively permit the state to override the Tribe's power to dictate the terms on which non-members could utilize reservation resources.[47] Concurrent jurisdiction would also interfere with the comprehensive scheme of federal and tribal management established pursuant to federal law, allowing the state to supplant the scheme with an inconsistent dual system which could severely impede the ability of the Tribe to conduct a sound management program.[48] Finally, the Court noted that concurrent jurisdiction would threaten Congress' overriding objective of encouraging tribal self-sufficiency and self-government, by allowing enforcement of regulations which would "seriously 'undermine the [government's and the Tribe's] ability to make the wide range of determinations committed [by Congress] to [their] authority.' "[49]

Evaluating the weight of the state interest, the court emphasized that New Mexico had neither contributed any significant funds or services to the maintenance, preservation, or improvement of reservation resources, nor was able to point to any off-reservation effects that would warrant state intervention.[50] New Mexico therefore had no interest sufficiently weighty to justify the deleterious effects created by recognizing concurrent jurisdiction.[51] Accordingly, the Court's "particularized inquiry" into the nature of the asserted federal, state, and Tribal interests led to its determination that the State's exercise of jurisdiction over the on-reservation hunting and fishing activities of non-members was preempted by the operation of federal law.[52]

D. *Consequences*

It seems clear that the Supreme Court granted certiorari following its remand in reliance on *Montana v. United States* to attempt to clarify the troublesome issues arising from conflicting exercises of state and tribal authority over resources located on Indian lands. Indeed, *Mescalero* gives every indication of the Court's interest in shoring-up, to some meaningful extent, the eroding concept of tribal sovereignty while at the same time assuring all affected parties (federal, state, and Indian) of fair and equitable consideration.

§ 1321(b)(1982) (preempting state authority to regulate Indian hunting, trapping, or fishing rights granted by federal treaty or statute)); *see also* 25 U.S.C. § 476 (1982).

46. *See* 103 S. Ct. at 2382-83.

47. 103 S. Ct. at 2388. For example, the Tribal ordinance permitting the killing of both a buck and a doe is based on the recommendations of a Bureau of Indian Affairs range conservationist and is intended to curb effectively the excessive growth of the on-reservation deer population. The state regulations do not reflect this objective, and because killing a doe would violate state law, Tribal authority would be effectively abrogated. *Id.* at 2389.

48. *Id. See also supra* note 47.

49. 103 S. Ct. at 2389 (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 149 (1980)).

50. 103 S. Ct. at 2390-91.

51. *See id.* at 2391.

52. *Id.*

It remains to be seen, however, if the Court's "particularized inquiry" approach will accomplish this task.

It is, indeed, a reality that certain resources are becoming scarce. When some of those resources are located on or run through Indian lands (*e.g.*, wildlife, minerals, or water), bordering states are likely to assert or attempt to assert some degree of jurisdiction over the use or dispensation of those resources. Affected Indian tribes, very much wary of state encroachment on their tribal jurisdiction, are just as likely to resist through litigation. Similarly, the federal government, responsible for establishing and protecting the scope of tribal jurisdiction, has an interest in conflicts between state and tribal authority. Fair determination of such tripartite interests will surely challenge the Court's ingenuity.

Because the analysis of federal preemption recognizes the strong federal policy toward tribal self-government, the Court's "particularized inquiry" analysis, at least superficially, reduces the probability of an unbalanced weighing of tribal interests. The concern, however, is for those situations when a case arises where, unlike *Mescalero*, the asserted interests are not so clearly de minimis in relation to each other. For instance, it will be interesting to follow the Court's application of its particularized "inquiry" to cases where states are able to show a substantial interest. It remains to be seen how weighty an asserted state interest must be in order to tip the scales in favor of concurrent jurisdiction.

*Susan N. Harris Dixon*

## II. *WATT V. WESTERN NUCLEAR CORP.*—REVERSED

Under the Stock-Raising Homestead Act[1] (SRHA), over thirty million acres of public land were transferred to private ownership.[2] Although the lands were transferred in fee,[3] the title acquired was limited by a reservation to the United States of "all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same."[4] The question presented to the Supreme Court in *Watt v. Western Nuclear, Inc.*[5] was whether the Tenth Circuit had properly excluded gravel from the ambit of the SRHA's mineral reservation.[6] In a five-four decision, the Court reversed the Tenth Circuit and held that gravel was a reserved mineral under the SRHA.[7]

The question of gravel's reserved mineral status arose following fifty years of administrative practice in which gravel was not treated as a mineral reserved pursuant to the SRHA.[8] Notwithstanding that prior practice, an

1. 43 U.S.C. §§ 291-302 (1976).
2. Watt v. Western Nuclear, Inc., 103 S. Ct. 2218, 2222 & n.4 (1983).
3. *See* 43 U.S.C. § 293 (1976).
4. 43 U.S.C. § 299 (1976).
5. 103 S. Ct. 2218 (1983).
6. *Id.* at 2222-23. *See* Western Nuclear, Inc. v. Andrus, 664 F.2d 234 (1981), *rev'd sub nom.* Watt v. Western Nuclear, Inc., 103 S. Ct. 2218 (1983).
7. 103 S. Ct. at 2232.
8. *See id.* at 2238 (Powell, J., dissenting).

administrative trespass action was brought against Western Nuclear, Inc., alleging that Western Nuclear's removal of gravel from land originally patented under the SRHA impinged on the government's mineral rights.[9] The administrative tribunals ruled that gravel was a mineral reserved under SRHA, and that Western Nuclear's removal of this mineral without the United States' consent constituted an involuntary trespass.[10]

Hearing an appeal from the administrative order, the district court noted that although the SRHA mineral exemption was to be construed according to Congress' intent at the time of enactment[11] there was no clear evidence of Congress' intent to include or exclude gravel.[12] There was, however, clear evidence that by including the mineral reservation Congress had intended to sever the mineral estate from the surface estate.[13] The purpose of this severance, according to the district court, was to provide settlers with free land while simultaneously ensuring that undiscovered valuable substances remained the property of the government.[14] Thus, it was irrelevant whether a particular substance was considered a mineral at the time of SRHA's enactment. Congress' intent was not to tie the severed estate to a particular set of defined substances, but was to reserve ownership of all subsurface substances which experience proved were "of commercial value."[15] Hence, because gravel had become a valuable subsurface substance, it fell within the SRHA mineral reservation.[16]

The Tenth Circuit rejected the district court's flexible definition of the term "mineral" in the SRHA reservation, and instead examined whether Congress had specifically intended to include gravel in the reserved mineral estate.[17] The court noted that at the time SRHA was enacted, the Interior Department's interpretation of the term "mineral" excluded gravel.[18] Similarly, gravel was not an energy source of the kind Congress clearly intended

9. *Id.* at 2221.

10. Western Nuclear, Inc., 85 Interior Dec. 129 (1978), *aff'd*, 475 F. Supp. 654 (D. Wyo. 1979), *rev'd*, 664 F.2d 234 (10th Cir. 1981), *rev'd*, 103 S. Ct. 2218 (1983).

11. Western Nuclear Corp. v. Andrus, 475 F. Supp. 654, 656 (D. Wyo. 1979), *rev'd*, 664 F.2d 234 (10th Cir. 1981), *rev'd sub nom.* Watt v. Western Nuclear Corp., 103 S. Ct. 2218 (1983).

12. *See* 475 F. Supp. at 662 (concluding, after examination of authorities, that the term "mineral" did not have a "closed, precise meaning" at time of SRHA's enactment).

13. *Id.* at 658.

14. *Id.* at 662-63. The district court observed that the entire concept of a patent reserving mineral rights to the government was a response to the fraudulent claims and unintended transfers which had become rampant under the prior system of categorically classifying land as mineral or nonmineral, and then transferring all the rights to the land, regardless of the land's actual mineral content. *See id.* at 657. *See generally* P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 503-19 (1968).

15. 475 F. Supp. at 662-63. The district court relied on United States v. Union Oil Co., 549 F.2d 1271 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977), which held that geothermal resources fell within SRHA's mineral reservation because Congress had not intended to transfer any subsurface energy resources to SRHA homesteaders. *Id.* at 1274, *quoted in Western Nuclear*, 475 F. Supp. at 662.

16. 475 F. Supp. at 663.

17. Western Nuclear, Inc. v. Andrus, 664 F.2d 234, 239 (10th Cir. 1981), *rev'd sub nom.* Watt v. Western Nuclear, Inc., 103 S. Ct. 2218 (1983).

18. *See* Zimmerman v. Brunson, 39 Pub. Lands Dec. 310 (1910), *overruled*, Layman v. Ellis, 52 Pub. Lands Dec. 714 (1929). The SRHA was enacted in 1916. Stock Raising Homestead Act of 1916, 39 Stat. 862, ch. 9 (codified as amended at 43 U.S.C. §§ 291-302 (1976)).

to reserve,[19] nor was it a substance normally associated with prospecting and mining.[20] Further, to include gravel within the SRHA reservation would, given the nature of most of the terrain subject to the SRHA, effectively nullify SRHA's grant of land ownership: "[i]f such common substances [as gravel] were considered to be included within the mineral reservation, then under all the many patents issued pursuant to the Stock-Raising Homestead Act, the patentees would own only the dirt, and little or nothing more."[21] The Tenth Circuit concluded that, in light of all the above factors, gravel was not a reserved mineral under the SRHA.[22]

In reversing the Tenth Circuit, a majority of the Court concluded, under a flexible analysis similar to that used by the district court, that gravel fell within the SRHA's mineral reservation.[23] The majority found that there was no prevailing legal understanding of the term "mineral" at the time of SRHA's enactment.[24] Although the Interior Department's construction of the term "mineral" when classifying lands as mineral or non-mineral had indeed excluded gravel,[25] a contemporaneous Supreme Court construction of the term "mineral" had approved a definition which included gravel as a mineral.[26] Hence, there was no basis for assuming that Congress had necessarily adopted the Interior Department's construction of the term "mineral."[27]

Having rejected a solution based on the importation of meaning through contemporaneous constructions of similar Acts, the Court investigated the degree to which the purposes underlying the SRHA would illuminate gravel's status as a reserved mineral.[28] Reviewing the genesis of the reserved-right patent, the Court concluded that Congress had been attempting to prevent abuse of the homestead land grant program and ensure that the homestead program did not prevent mineral exploitation of homestead lands.[29] Thus, Congress' purpose in severing the mineral estate was to assure the "concurrent development of both the surface and subsurface of SRHA lands."[30]

Next, echoing the district court, the Supreme Court examined the appropriate characterization of gravel in light of Congress' functional purpose in severing the mineral estate from the surface estate.[31] The Court found

19. 664 F.2d at 241 (distinguishing United States v. Union Oil Co., 547 F.2d 1271 (9th Cir.), *cert. denied*, 434 U.S. 930 (1977)).

20. 664 F.2d at 242 (quoting State Land Bd. v. State Dep't of Fish & Game, 408 P.2d 707, 708 (Utah 1965)).

21. *See* 664 F.2d at 242.

22. *Id.*

23. Watt v. Western Nuclear, Inc., 103 S. Ct. 2218 (1983), *rev'g* Western Nuclear Corp. v. Andrus, 664 F.2d 234 (10th Cir. 1981).

24. 103 S. Ct. at 2223.

25. *Id.* at 2224 (citing Zimmerman v. Brunson, 39 Pub. Lands Dec. 310 (1910), *overruled*, Layman v. Ellis, 52 Pub. Lands Dec. 714 (1929)).

26. 103 S. Ct. at 2224 (citing Northern Pac. Ry. Co. v. Soderberg, 188 U.S. 526, 536 (1903)).

27. 103 S. Ct. at 2224.

28. *Id.* at 2225.

29. *See id.* at 2225-26.

30. *Id.* at 2226.

31. *See id.* at 2227. The Court stated that "[s]ince Congress intended to facilitate develop-

that because Congress' primary intention in enacting the SRHA was to permit families to support themselves through farming and ranching,[32] Congress had not contemplated that homsteaders would exploit the subsurface estate for commercial purposes.[33] In reserving the mineral estate Congress had therefore reserved ownership of all inorganic subsurface substances which were commercially exploitable and which were not necessary to effect the ranching and farming surface uses contemplated by the SRHA.[34] Because gravel was part of the reserved mineral estate under the Court's functional definition, the Court reversed the Tenth Circuit and affirmed the district court.[35] To buttress its conclusion, the Court noted that gravel had traditionally been characterized as a mineral under federal mining laws,[36] and that case law had established a principle of construction disfavoring conveyances of rights not explicitly set forth in a government patent.[37]

The dissent, like the Tenth Circuit, focused on the fact that at the time of SRHA's enactment the Interior Department had concluded, after many years of experience with materials of a quasi-mineral character, that gravel was not a mineral for purposes of classifying public lands.[38] Given the Interior Department's important role in drafting the SRHA and testifying in its favor,[39] it was reasonable to conclude that Congress had not included gravel within the SRHA's mineral reservation.[40] Reference to other statutes also supported the conclusion that Congress did not generally include gravel when using the term "mineral."[41] Finally, Congress had not enacted SRHA solely for economic reasons; there was an overriding civic interest in making persons independent landowners.[42] In light of this intent, Congress surely did not intend to "destroy that sovereignty by reserving the commonplace substances that actually constitute much of [the granted land]."[43] Thus, the dissent would have affirmed the Tenth Circuit and held that gravel was not a reserved mineral.[44]

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ment of both surface and subsurface resources, the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated." *Id.*

32. *See id.* at 2228.

33. *Id.* at 2228-30.

34. *Id.* at 2228 & 2229 n.14. Under the Court's functional approach to defining the scope of the SRHA mineral reservation, the homesteader has the right to use otherwise reserved minerals for homestead purposes. *Id.* at 2229 n.15.

35. *Id.* at 2232.

36. *Id.* at 2230-31.

37. *Id.* at 2231 (quoting United States v. Union Pac. R.R., 353 U.S. 112 (1957)).

38. *See id.* at 2233-35 (Powell, J., dissenting).

39. *Id.* at 2235 & n.9.

40. *Id.* at 2235-36.

41. *Id.* at 2236-37.

42. *Id.* at 2238.

43. *Id.*

44. *Id.*

## III. *SILKWOOD V. KERR-MCGEE CORP.*—REVERSED

In a five-four decision, the Supreme Court reversed the portion of the Tenth Circuit Court of Appeals' decision in *Silkwood v. Kerr-McGee Corp.*[1] which held that certain punitive damage awards were preempted by federal regulation of nuclear plant safety.[2] The Court held that Congress, in enacting and amending the Atomic Energy Act of 1954,[3] had not intended to preclude victims of nuclear power plant radiation incidents from pursuing state-authorized tort remedies.[4] An award of punitive damages imposed under state tort law, although having a regulatory effect on plant safety, was therefore not preempted.[5]

### A. *Facts*

Karen Silkwood, a worker at a Kerr-McGee nuclear fuel plant in Oklahoma, had been contaminated by plutonium during a three-day period in November, 1974.[6] Shortly thereafter, she was killed in an unrelated automobile accident.[7] Silkwood's estate brought common law tort actions in federal district court against Kerr-McGee to recover for the personal injuries and property damages caused by the contamination.[8]

### B. *Lower Court Treatment of* Silkwood

The district court entered judgment on a jury verdict awarding the estate $505,000 in compensatory damages and $10,000,000 in punitive damages.[9] Kerr-McGee appealed to the Tenth Circuit, alleging, inter alia,[10] that recovery for Silkwood's personal injuries was confined to workers' compensation limits and that imposition of punitive damages was preempted by federal law.[11]

The Tenth Circuit agreed that, in the absence of contrary evidence, a worker's injuries should be presumed to have occurred during the course of employment.[12] Thus, Oklahoma's Workers' Compensation Act[13] provided

1. 667 F.2d 908 (10th Cir. 1981), *rev'd in part*, 104 S. Ct. 615 (1984).
2. Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615 (1984).
3. 42 U.S.C. §§ 2011-2284 (1976 & Supp. V 1981).
4. 104 S. Ct. at 625.
5. *Id.* at 626.
6. *Id.* at 618.
7. *Id.*
8. *Id.*
9. Silkwood v. Kerr-McGee Corp., 485 F. Supp. 566 (W.D. Okla. 1979), *aff'd in part and rev'd in part*, 667 F.2d 908 (10th Cir. 1981), *rev'd in part*, 104 S. Ct. 615 (1984).
10. Kerr-McGee also claimed that the verdict was excessive and contrary to the weight of the evidence, that the trial court had erred in rulings and instructions, and that prejudicial publicity, misconduct of opposing counsel, and errors in the court's rulings and instructions had denied it a fair trial. Brief of Appellants at 20-30, Silkwood v. Kerr-McGee Corp., 667 F.2d 908 (10th Cir. 1981), *rev'd in part*, 104 S. Ct. 615 (1984).
11. *Id.* For a discussion of the Tenth Circuit Court's decision, see Comment, Silkwood v. Kerr-McGee Corp.: *Workers' Compensation and Federal Preemption Rescue the Nuclear Tortfeasor*, 60 DEN. L.J. 291 (1983).
12. 667 F.2d at 917.
13. OKLA. STAT. tit. 85, §§ 1-180 (1981 & Supp. 1983).

the sole basis to recover damages for Silkwood's personal injuries.[14] Conversely, compensatory damages for Silkwood's destroyed property were recoverable under state tort law because such recovery was not preempted by either the state workers' compensation laws or by the federal nuclear regulatory scheme.[15]

In assessing Kerr-McGee's argument that punitive damages were preempted by federal regulation of nuclear plant safety, the court of appeals focused on the deterrent, and therefore regulatory, effect of punitive damages.[16] Relying on *Northern States Power Co. v. Minnesota*,[17] the court stated that the usually strong presumption against preemption must yield when the federal government extensively occupies a regulatory area, as it had done in the area of radiation hazards created by nuclear development.[18] Writing for the majority, Judge Logan reasoned that a judicial award of punitive damages was as intrusive upon the federal regulatory scheme as a direct legislative act of the state.[19] The regulatory effect of punitive damage awards therefore conflicted with federal control over nuclear safety.[20] Further, the power to punish nuclear plant operators for violation of nuclear safety standards was vested in a federal agency,[21] indicating the superfluousness of punitive damages in the context of existing federal regulations.[22] These factors led the court to conclude that punitive damage awards were preempted for tort claims involving radiation hazards associated with nuclear power plants.[23]

In a vigorous dissent, Judge Doyle contended that preventing imposition of punitive damages in a case such as *Silkwood* "carries the preemption concept far beyond anything that could have been intended or could ever be implied [by the Atomic Energy Act of 1954]."[24] The proper test, Judge Doyle wrote, is whether an award of punitive damages impedes the accomplishment of congressional purposes and objectives.[25] Under this test, preemption did not apply to *Silkwood*.[26] Judge Doyle characterized tort actions as "a far cry" from the explicit statutory regulation found preempted in *Northern States*.[27] Tort claims, including punitive damage claims, did not collide with the federal regulatory scheme, and therefore were not preempted.[28]

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14. 667 F.2d at 919.
15. *Id.* at 920.
16. *Id.* at 922.
17. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).
18. The nuclear industry was initially developed by the federal government, and is closely linked with national security; the overall industry, especially in the area of radiation hazards, is extensively regulated by the federal government. *Silkwood*, 667 F.2d at 923.
19. *Id.* at 923.
20. *Id.* at 922-23.
21. *Id.* at 923.
22. *Id.*
23. *See id.*
24. *Id.* at 929 (Doyle, J., dissenting).
25. *Id.* at 930 (quoting Hines v. Davidowitz, 312 U.S. 52 (1941)).
26. 667 F.2d at 930 (Doyle, J., dissenting).
27. *Id.* at 929.
28. *Id.* Judge Doyle emphasized that Congress' purpose was to preempt state *licensing* au-

C. Silkwood *in the Supreme Court*

1. The Majority Opinion

The Supreme Court apparently agreed with Judge Doyle's analysis. Justice White, writing for the majority, stated that the test for preemption in radiation injury cases is not, as the Tenth Circuit held, whether the federal government has occupied the field.[29] Rather, the test is whether the state law in question conflicts with or frustrates the objectives of federal law.[30]

The Court explained that its holding in *Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*,[31] decided only nine months earlier, was inapplicable to *Silkwood*.[32] In *Pacific Gas*, the Court held that the federal government had occupied the entire field of nuclear safety regulation, and that states were therefore prohibited from regulating the safety aspects of nuclear development.[33] According to Justice White, the preempted field did not include traditional state tort law remedies.[34] This conclusion was based on an analysis of legislative history relating to the Atomic Energy Act. Conceding that the regulatory effect of state tort law arguably justified a finding of preemption under *Pacific Gas*,[35] the majority held that Congress had nonetheless intended that state remedies be left intact.[36]

First, there was no legislative evidence that Congress, in deciding to license private nuclear plants, had intended to prevent recovery for injuries caused by plant operations.[37] Congress' failure to provide any federal remedies for nuclear incident injuries was further evidence that state tort remedies were not preempted; the Court refused to find a congressional intent to "remove all means of judicial recourse for victims of illegal conduct."[38] Finally, the only congressional discussion about the relationship between the federal law and state tort law remedies indicated that Congress believed that state remedies would be available.[39]

Although conceding that an award of damages based on state law was regulatory in the sense that a nuclear facility could be threatened with liabil-

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thority, not to preempt general state laws which merely affected nuclear plants. *See id.* at 929-30.

29. 104 S. Ct. at 626.

30. *Id.*

31. 103 S. Ct. 1713 (1983).

32. *See* 104 S. Ct. at 622-26.

33. 103 S. Ct. at 1726.

34. *See* 104 S. Ct. at 625.

35. *Id.*

36. *Id.*

37. The Court found that "there is no indication that Congress even seriously considered precluding the use of such remedies . . . ." *Id.* at 625.

38. *Id.* (citing United Construction Workers v. Laburnum Corp., 347 U.S. 656, 663-64 (1954)).

39. 104 S. Ct. at 623-26. The legislative history of the Atomic Energy Act did not contain any discussion of the interaction between federal licensing and state tort law. Legislative history from the Price-Anderson Act, 42 U.S.C. § 2210 (1976), which limits the direct liability of nuclear plant operators in the event of catastrophic nuclear occurrences, revealed that Congress believed that state tort law remedies survived the enactment of the Atomic Energy Act. *See* 104 S. Ct. at 623-26.

ity for failing to conform to state standards, the Court found that this "regulatory consequence was something Congress was quite willing to accept."[40] The Court therefore remanded the case to the Tenth Circuit, adding that Kerr-McGee could reassert any claim not addressed by the Tenth Circuit,[41] including its claim that the punitive damage award was excessive and unsupported by the evidence.[42]

2. Justice Blackmun's Dissent

Justice Blackmun, joined by Justice Marshall, dissented, saying that the decision "tortures [the Court's] earlier decisions" and "wreaks havoc with the regulatory structure that Congress carefully created."[43] According to Justice Blackmun, *Pacific Gas* mandated the Court to find that state laws intended to regulate nuclear power safety were preempted.[44] Because Oklahoma's state-authorized punitive damages award was intended to deter a nuclear facility from operating in a particular manner, such an award was regulatory, and was preempted.[45] Compensatory damages, which were not intended to achieve a regulatory goal, would therefore be allowable under *Pacific Gas*.[46]

3. Justice Powell's Dissent

Justice Powell, joined by Chief Justice Burger and Justice Blackmun, dissented, saying that the majority's the decision was inconsistent with federal law, legislative history, and the Court's decision in *Pacific Gas*.[47] This dissent agreed with the Tenth Circuit's conclusion that the regulatory effect of a punitive damage award would impermissibly interfere with federal regulation.[48]After *Silkwood*, nuclear operators would no longer be able to rely on the agency expertise embodied in federal safety standards.[49] Similarly, the public would be denied the benefits of a unitary program of safety regulation.[50] *Silkwood*, according to Justice Powell, opened the door for ad hoc jury regulation of the nuclear industry, which would clearly interfere with the congressional purpose of creating an exclusive federal prerogative to regulate the radiation hazards associated with nuclear plants.[51] Further, permitting ad hoc jury regulation was unfair to operators complying with stringent federal standards[52] and could discourage investment in a vital

40. 104 S. Ct. at 626.
41. *See supra* note 10.
42. 104 S. Ct. at 626-27.
43. *Id.* at 627 (Blackmun, J., dissenting).
44. *Id.* at 627-28.
45. *Id.* at 628. Justice Blackmun stated: "[T]he punitive damages award in this case deters a nuclear facility from operating in the same manner as Kerr-McGee. Authority for a state to do so, however, is precisely what the Court held to be pre-empted [sic] in *Pacific Gas*." *Id.*
46. *Id.* at 629.
47. *Id.* 634-41 (Powell, J., dissenting).
48. *Id.* at 635.
49. *Id.* at 640.
50. *See id.* at 639.
51. *See id.* at 639-40.
52. *Id.* at 640.

source of energy.[53] For all these reasons, Justice Powell and his fellow dissenters would have affirmed the Tenth Circuit.[54]

*Cheryl Scott*

## DISTRICT COURT DECISIONS

### I. *BROWN V. THOMSON*—AFFIRMED

In *Brown v. Thomson*,[1] the Supreme Court affirmed the determination of a three judge district court panel[2] upholding the constitutionality of Wyoming's most recent reapportionment statute.[3] The statute was upheld by virtue of a concurring opinion, with three Justices dissenting.[4] The Court's reasoning is questionable in light of previous reapportionment decisions, and is at best of little precedential value because of the very narrow issue the case decided. Instead of reviewing the constitutionality of Wyoming's reapportionment plan as a whole, the Court limited its decision to the issue of whether Wyoming's policy of preserving county boundaries justified the deviations from population equality[5] resulting from the provision of a state representative to Niobrara County, which would not have been entitled to a representative on the basis of population equality.[6] The basis for the Court's decision to uphold the statute was that providing the additional representative effected a state policy lacking any hint of arbitrariness or discrimination against population centers while simultaneously having only a de minimus

53. *Id.*

54. *Id.* at 640-41.

1. 103 S. Ct. 2690 (1983). *Brown v. Thomson* was the third unsuccessful challenge to Wyoming's apportionment of its House of Representatives in the last 20 years. The first challenge, Schaefer v. Thomson, 240 F. Supp. 247 (D. Wyo. 1964), *supplemented*, 251 F. Supp. 450 (D. Wyo. 1965), *aff'd sub nom.* Harrison v. Schaefer, 383 U.S. 269 (1966), was decided shortly after Reynolds v. Sims, 377 U.S. 533 (1964), the seminal decision in the area of state legislature apportionment. *Sims* included two important holdings. First, the equal protection clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 2, required that state representatives be elected through a system reflecting the principle of equal representation for equal numbers of people. 377 U.S. at 577. Second, deviations from perfect equality were permissible if such deviations resulted from "legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 579. *Schaefer* upheld Wyoming's apportionment of its House of Representatives because the deviations from population equality did not dilute the voting strength of population centers, and because the deviations resulted from the legitimate state policy of seeking to provide representation for all counties. 240 F. Supp. at 251. *Cf. Sims*, 377 U.S. at 580 (recognizing that provision of representation for political subdivisions is a legitimate basis for deviations from population). Thompson v. Thomson, 344 F. Supp. 1378 (D. Wyo. 1972), the second challenge, rejected the plaintiffs' constitutional arguments on the same grounds articulated in *Schaefer*. *Id.* at 1380.

2. 28 U.S.C. § 2284(a) (1982) requires that a three judge district court hear federal court challenges to state apportionment statutes.

3. WYO. STAT. § 28-2-109 (Supp. 1983). *See* Brown v. Thomson, 103 S. Ct. 2690 (1983), *aff'g* 536 F. Supp. 780 (D. Wyo. 1982).

4. Justices Stevens and O'Connor concurred in Justice Powell's opinion. Brown v. Thomson, 103 S. Ct. 2690, 2699 (1983) (O'Connor, J., concurring). Justices White, Marshall, and Blackmun joined Justice Brennan's dissent. *Id.* at 2700 (Brennan, J., dissenting).

5. "Population equality" is a shorthand phrase describing the situation in which equal numbers of people elect equal numbers of representatives. *See* 103 S. Ct. at 2693. *See also supra* note 1.

6. *See* 103 S. Ct. at 2693-95.

dilutive effect upon the voting strength of Wyoming's electorate.[7]

A. *Background*

Wyoming's Constitution requires that each of the state's counties "shall constitute a senatorial and representative district"[8] and that "each county shall have at least one senator and one representative."[9] In addition, the constitution requires that the representatives be apportioned among the counties as equally as possible on the basis of population.[10]

As the district court pointed out, Wyoming is unique in that it has always had a very small population distributed through a large area.[11] Consequently, counties have always been the major political subdivision within the state, and in fact act as the major administrators of state government programs.[12] Historically, this central role of counties in Wyoming's political structure has been manifested by requiring that each county have at least one representative in Wyoming's House of Representatives.[13] As noted, the challenge in *Thomson* was limited to the application of this policy to Niobrara County.[14]

Following the 1980 census, Wyoming reapportioned its state legislature.[15] The new apportionment statute[16] provided for a maximum of 64 representatives,[17] making the ideal apportionment one representative for every 7,337 persons.[18] Because Wyoming's constitution required allocation of at least one representative to each county,[19] including Niobrara, the state's least populous county with only 2,924 people,[20] the distribution of

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7. *Id.* at 2698.
8. WYO. CONST. art. III, § 3.
9. *Id.*
10. *Id.*
11. Brown v. Thomson, 536 F. Supp. 780, 784 (D. Wyo. 1982), *aff'd* 103 S. Ct. 2690 (1983).
12. 536 F. Supp. at 784.
13. *Id.*
14. *See supra* notes 6-7 and accompanying text.
15. 103 S. Ct. at 2694.
16. WYO. STAT. § 28-2-109 (Supp. 1983). This statute provides in relevant part:

(a) The ratios for the apportionment of senators and representatives are fixed as follows:

. . . . .

(ii) The ratio for the apportionment of the representatives is the smallest number of people per representative which when divided into the population in each representative district as shown by the official results of the 1980 federal decennial census with fractions rounded to the nearest whole number results in a house with sixty-three (63) representatives;

(iii) If the number of representatives for any county is rounded to zero (0) under the formula in paragraph (a)(ii) of this section, that county shall be given one (1) representative which is in addition to the sixty-three (63) representatives provided by paragraph (a)(ii) of this section;

(iv) If the provisions of paragraph (a)(iii) of this section are found to be unconstitutional or have an unconstitutional result, then Niobrara county shall be joined to Goshen county in a single representative district and the house of representatives shall be apportioned as provided by paragraph (a)(ii) of this section.

*Id.*

17. *Id.* § (a)(ii), -(iii).
18. 103 S. Ct. at 2694.
19. WYO. CONST. art. III, § 3.
20. 103 S. Ct. at 2694.

representatives among the state's population became unequal. In fact, the plan as enacted had an average deviation from the ideal number of residents per representative of sixteen percent and a maximum deviation between the largest and smallest number of residents per representative of eighty-nine percent.[21] These deviations were very similar to the deviations present in two prior decisions upholding Wyoming's apportionment of its House of Representatives.[22]

Plaintiffs, the League of Women Voters and citizens from Wyoming's seven most populous counties, alleged that providing one representative to Niobrara County despite its small population impermissibly diluted the voting privileges and rights of plaintiffs and other citizens similarly situated.[23] Plaintiffs sought declaratory and injunctive relief to prevent Niobrara County from having its own representative, and to require implementation of the statutory provision which was explicitly designed to be effective if provision of a representative for Niobrara County was declared unconstitutional.[24]

### B. *The District Court Decision*

Because of the nature of the plaintiffs' allegations, the district court decided the case on the very narrow issue of the dilutive effect of the one representative granted to Niobrara County.[25] The court found that the presence of Niobrara County's representative in the state legislature had a statistically insignificant dilutive effect on plaintiffs' voting rights.[26] In light of the de minimus effect of providing the representative for Niobrara County, the state's legitimate and nondiscriminatory desire to maintain the integrity of counties as the state's operative political subdivisions was a sufficient basis for concluding that the statute was constitutional.[27]

### C. *The Supreme Court's Opinion*

#### 1. The Majority

Like the district court, the Supreme Court refused to review the constitutionality of the statute as a whole, despite the blatant deviations from population equality.[28] The majority reasoned that although previous apportionment decisions had considered aspects of apportionment plans not directly challenged by the parties,[29] there was no constitutional mandate that the Court undertake such a sua sponte inquiry.[30] Accordingly, the court

21. *Id.*
22. *Id. See supra* note 1.
23. 103 S. Ct. at 2695.
24. *Id. See* WYO. STAT. § 28-2-109(a)(iv) (Supp. 1983).
25. 536 F. Supp. at 781.
26. *Id.* at 783.
27. *Id.*
28. 103 S. Ct. at 2698 & n.9.
29. *Id.* at 2698 n.9. *See* Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 735 n. 27 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964).
30. 103 S. Ct. at 2698 n.9 (citing Gaffney v. Cummings, 412 U.S. 735, 739 n.5 (1973)).

restricted its inquiry to those challenges explicitly raised by the plaintiffs.[31] Whether or not the Court's decision to narrow the issues was justified, a majority was obtained through the concurrences of Justices O'Connor and Stevens, who joined the opinion on the understanding that it made no comment on the reapportionment plan taken as a whole, which they doubted could survive constitutional scrutiny.[32]

The Court supported its decision to uphold the statute by relying on a series of cases that justified deviations from population equality because of legitimate state objectives.[33] Justice Powell, writing for the Court, noted that *Reynolds v. Sims*[34] held that a state must make an honest and good faith effort to construct districts of equal population,[35] but that because perfect equality was impossible, legitimate state policies, such as preservation of political subdivisions, could justify deviations from equality.[36] The Court then pointed out that decisions following *Sims* had established that an apportionment plan with a maximum deviation of greater than ten percent created a prima facie case of discrimination, and was therefore unconstitutional unless justified by the state.[37] Proof that the legislative plan reasonably advanced a rational state policy and did not result in unconstitutional population disparities among the districts satisfied the state's burden of justification.[38] Justice Powell conceded that the challenged portion of Wyoming's plan exceeded the acceptable minimum deviation,[39] but he found that the plan's provision of a representative for Niobrara County was nonetheless constitutional, in light of the state's proffered policy justification and the minimal systemwide population disparities resulting solely from providing a representative for Niobrara County.[40]

There were several factors the Court weighed in favor of the reapportionment statute. First, through the years Wyoming had consistently applied its county-oriented representation policy without discrimination or arbitrariness.[41] Second, the statute ensured that "population deviations are no greater than necessary to preserve counties as representative districts."[42] Finally, no evidence indicated that the legislative plan reflected a bias tending to favor "particular political interests or geographic areas."[43] The Court noted that *Thomson* could be distinguished from many prior decisions invalidating apportionment plans based on political subdivisions, because those state defendants failed to prove the deviations resulted from the good faith

31. 103 S. Ct. at 2698 n.9.

32. *Id.* at 2700 (O'Connor, J., concurring).

33. *See, e.g.*, Mahan v. Howell, 410 U.S. 315, 328 (1973); Swann v. Adams, 385 U.S. 440, 444 (1967); Reynolds v. Sims, 377 U.S. 533, 579-80 (1964).

34. 377 U.S. 533 (1964).

35. *Id.* at 577.

36. *Id.* at 580-81.

37. 103 S. Ct. at 2696 (citing Swann v. Adams, 385 U.S. 440, 444 (1967)).

38. *See* 103 S. Ct. at 2696 (citing Mahan v. Howell, 410 U.S. 315, 328 (1973)).

39. 103 S. Ct. at 2696.

40. *Id.* at 2698-99.

41. *Id.* at 2696.

42. *Id.*

43. *Id.* at 2697 (quoting Abate v. Mundt, 403 U.S. 182, 187 (1971)).

application of a legitimate state policy.[44] Justice Powell buttressed his conclusion as to the legitimacy of Wyoming's plan by quoting language from *Sims* stating that the character, as well as the degree, of deviation from strict population equality must be considered in evaluating an apportionment plan's constitutionality.[45]

Having established the legitimacy of Wyoming's reasons for districting by political subdivision, the Court analyzed the dilutive effect of providing a representative for Niobrara County, and agreed with the district court's that any dilutive effect was de minimus.[46] To support its conclusion, the Court observed that considerable population variations would remain even if Niobrara County did not have its own representative: the average deviation would be thirteen percent and the maximum deviation would be sixty-six percent.[47] In addition, the only difference resulting from granting plaintiffs their requested relief would be that plaintiffs' class of voters would elect 44.44% of the legislature rather 43.75%.[48] In view of the minimal effect Niobrara's one representative had on the statewide allocation of voting power, and because Wyoming's county-oriented policy was applied neither discriminatorily nor arbitrarily, the Court held that the fourteenth amendment[49] was not violated by providing a representative for Niobrara County.[50]

2. The Dissent

In a strong dissenting opinion, Justice Brennan, joined by Justices White, Marshall, and Blackmun, questioned the majority's decision and reasoning on several points. The dissent began by emphasizing that *Thomson* was essentially lacking in precedential value because it was decided on such a narrow issue.[51] *Thomson* could provide precedential value only in cases challenging the incremental dilutive effect of similar reapportionment plans.[52]

Justice Brennan accused the majority of using two false premises in order to avoid considering the plan in its entirety.[53] First, the majority had presumed that the only aspect of unequal representation that matters is the degree of individual vote *dilution*.[54] This premise was clearly wrong, because the Constitution's protections were not limited to preventing dilution of voting power; the Constitution also barred *inflating* voting power.[55] Thus, just as a state could not effectively give two votes to persons named Niobrara, the

44. 103 S. Ct. at 2697 n.6 (citing Chapman v. Meier, 420 U.S. 1, 25 (1975); Kilgarlin v. Hill, 386 U.S. 120, 124 (1967) (per curiam); Swann v. Adams, 385 U.S. 440, 445-46 (1967)).

45. 103 S. Ct. at 2697 (quoting Reynolds v. Sims, 377 U.S. 533, 581 (1964)).

46. 103 S. Ct. at 2698.

47. *Id.*

48. *Id.* Under the alternative plan, *see supra* notes 15-16 and accompanying text, the seven counties represented by plaintiffs would elect 28 of 63 representatives instead of 28 of 64. 103 S. Ct. at 2698.

49. U.S. CONST., amend. XIV.

50. 103 S. Ct. at 2699.

51. *Id.* at 2700 (Brennan, J., dissenting).

52. *See id. See also supra* note 16.

53. 103 S. Ct. at 2703 (Brennan, J., dissenting).

54. *Id.*

55. *Id.*

state could not effectively give two votes to persons living in Niobrara County.[56] The Constitution barred both "exalted classes" of voters.[57] Second, the majority had reasoned that Niobrara County's representation could be severed from the rest of the scheme and evaluated in terms of its incremental effect on the equality of the system as a whole.[58] According to Justice Brennan, precedent did not justify the consideration of just one seat in a legislative body as though it had no connection to other seats; in order to adjudge the constitutionality of any one seat, the Court was required to evaluate a plan's total effects.[59] Moreover, adopting the majority's approach led to the perverse result of justifying a discriminatory feature of a plan through demonstrating that discrimination "otherwise inherent in a plan was not enhanced by the challenged feature."[60]

Turning to the merits, the dissent found Wyoming's plan manifestly unconstitutional.[61] Determinative was the fact that, despite the rationality of the state policy, the plan's proposed deviations from population equality were so large as to be intolerable under the Constitution.[62] Accordingly, the district court should have been reversed.[63]

*Linda K. Hammacher*

## II. *EEOC v. WYOMING*—REVERSED

*Equal Employment Opportunity Commission v. Wyoming*[1] (*EEOC v. Wyoming*) addressed the constitutionality of the Age Discrimination in Employment Act[2] (ADEA) as applied to the states. Specifically, the Court examined the extent to which the tenth amendment's[3] affirmative limitation on Congress' exercise of its commerce power[4] precluded application of the ADEA's an-

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 2704-05.
60. *Id.*
61. *Id.* at 2701-03.
62. *Id.* at 2701-02. Justice Brennan pointed out that of Wyoming's 23 counties, only 9 were within as much as 10% of population proportionality, that the plan's average deviation from ideal district size was 16%, and that the maximum deviation was 89%, all figures exceeding previously permitted deviations. *Id.* at 2702-03.
63. *See id.* at 2705.

1. 103 S. Ct. 1054 (1983).
2. 29 U.S.C. §§ 621-634 (1982). ADEA makes it unlawful for any employer to make employment decisions on the basis of age unless age is a bona fide occupational qualification. *Id.* § 623(f)(1). In 1974, ADEA was amended to include state and local governments within its definition of employer. Pub. L. No. 93-259, § 28, 88 Stat. 55, 74 (1974) (codified at 29 U.S.C. § 630(b) (1982)). The amendment provided that the term "employer" included "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a state. . . ." *Id.*
3. U.S. CONST. amend. X. This amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*
4. U.S. CONST. art. I, § 8, cl. 3 provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

tidiscrimination principles to state governments.[5] The Court reversed the United States District Court for the District of Wyoming,[6] and held that because ADEA did not seriously impair a state's ability to function autonomously, extending ADEA to state governments was a permissible exercise of Congress' commerce power.[7]

A. *The Facts*

Bill Crump, a fifty-five year old District Game Division Supervisor for the Wyoming Game and Fish Department, initiated this action by filing a complaint with the Equal Employment Opportunity Commission (EEOC) challenging his involuntary retirement.[8] The retirement was based upon the state's interpretation of a Wyoming statute[9] whereby a law enforcement officer was mandatorily retired at age fifty-five unless the officer accepted an administrative position.[10] Crump claimed that because the Game and Fish Department's mandatory retirement policy was limited to game wardens, the state had engaged in discrimination in violation of ADEA.[11] The EEOC filed suit in the district court on behalf of Crump, seeking damages as well as injunctive and declaratory relief.[12]

The district court dismissed the action,[13] reasoning that the tenth amendment immunity analysis recognized in *National League of Cities v. Usery*[14] and refined in *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*[15] precluded application of ADEA to state retirement programs for law enforcement officers.[16] Under the *National League of Cities/Hodel* analysis, states cannot be required to comply with federal laws which operate on the states qua states,[17] which implicate matters that are beyond peradventure attributes of state sovereignty,[18] which will impair a state's ability "to structure integral operations in the area of traditional governmental functions,"[19]

5. 103 S. Ct. at 1057. National League of Cities v. Usery, 426 U.S. 833 (1976) was the first decision to recognize that the tenth amendment would, in specified circumstances, act as an affirmative limitation on Congress' power to regulate state governments pursuant to the commerce power. *Id.* at 841-46.

6. EEOC v. Wyoming, 103 S. Ct. 1054 (1983), *rev'g* 514 F. Supp. 595 (D. Wyo. 1981).

7. 103 S. Ct. at 1062.

8. *Id.* at 1059.

9. WYO. STAT. § 31-3-107 (1977). The statute, which is part of Wyoming's retirement plan for highway patrol persons and game wardens, *see id.* §§ 31-3-101 to -121, states in relevant part: "An employee may continue in service on a year-to-year basis after . . . age fifty-five (55), with the approval of employer and under conditions as the employer may prescribe." *Id.* § 3-107(c).

10. EEOC v. Wyoming, 514 F. Supp. 595, 597 (D. Wyo. 1981), *rev'd*, 103 S. Ct. 1054 (1983).

11. 514 F. Supp. at 596.

12. *Id.* at 595.

13. *Id.* at 600.

14. 426 U.S. 833 (1976).

15. 452 U.S. 264 (1981).

16. 514 F. Supp. at 600. *See also id.* at 596 (state limited tenth amendment claim to program for retirement of law enforcement personnel).

17. National League of Cities v. Usery, 426 U.S. 833, 854 (1976). *Accord* Hodel v. Virginia Surface Mining & Reclamation Assn., 452 U.S. 264, 287 (1981).

18. *National League of Cities*, 426 U.S. at 845. *Accord Hodel*, 452 U.S. at 288.

19. *National League of Cities*, 426 U.S. at 852. *Accord Hodel*, 452 U.S. at 288.

and which do not reflect a supervening federal interest.[20] The district court observed that ADEA clearly acted on the states qua states,[21] that structuring the employment relationships incidental to providing park and recreation services was a traditional attribute of state sovereignty,[22] and that structuring retirement programs for law enforcement officers was an integral state legislative function which would be impaired by ADEA.[23] The court rejected the idea that a supervening national interest preempted state prerogative in this area, pointing out that Congress had itself imposed a mandatory retirement age for federal law enforcement personnel.[24] This inconsistency tipped the balance of interests in favor of Wyoming and required a finding that ADEA could not be applied to the state insofar as it affected Wyoming's employment relationship with its law enforcement personnel.[25] The EEOC appealed the district court's opinion directly to the Supreme Court.[26]

### B. *The Majority Opinion*

The majority concluded it was "unnecessary . . . to override Congress's express choice to extend ADEA to the states."[27] In reaching this decision, the majority rejected the district court's conclusions concerning Wyoming's tenth amendment immunity.

Although the federal statute involved in *EEOC v. Wyoming* clearly met the first requirement of regulating the "states as states,"[28] the Court questioned whether the mere fact that an employment relationship was involved satisfied the *National League of Cities* requirement that ADEA effect an essential attribute of state sovereignty.[29] The Court did not decide this issue, however, because it found that ADEA did not "directly impair" Wyoming's "ability to 'structure integral operations in areas of traditional governmental functions.' "[30]

Recognizing that management of state parks was a traditional state governmental function,[31] the majority's decision rested on its conclusion that ADEA minimally affected this integral function. The statute merely required Wyoming to test its retirement requirements against a "reasonable federal standard."[32] Under ADEA, Wyoming was not required to abandon

20. *Hodel*, 452 U.S. at 288 n.29.
21. *See* 514 F. Supp. at 596-97.
22. *Id.* at 600. *Accord National League of Cities*, 426 U.S. at 851.
23. 514 F. Supp. at 600.
24. *Id.*
25. *Id.*
26. EEOC v. Wyoming, 103 S. Ct. 1054, 1057 (1983). *See* 28 U.S.C. § 1252 (1982) (any party may appeal directly to Supreme Court from any decision of any court of the United States holding an Act of Congress to be unconstitutional).
27. 103 S. Ct. at 1062. The Court also noted that prior to the district court's decision in *EEOC v. Wyoming* federal courts had consistently held that application of ADEA to the states was constitutional. *Id.* at 1059 n.6.
28. *Id.* at 1061.
29. *Id.* at 1061 & n.11.
30. *Id.* at 1062 (quoting *National League of Cities*, 426 U.S. at 852).
31. 103 S. Ct. at 1062.
32. *Id. See* 29 U.S.C. § 623(f) (1982), which provides in part that "it shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action otherwise

its policy of ensuring competent game wardens; ADEA only required that the fitness of game wardens be determined on a particularized basis.[33] Therefore, the requirements of ADEA did not unduly infringe upon Wyoming's ability to effect its law enforcement policies.[34]

Having evaluated ADEA's direct policymaking effects, the majority then evaluated the degree to which ADEA would limit Wyoming's ability to effect policies over a broad range of state decisions.[35] This inquiry was held to be primarily legal, rather than factual, limited to evaluating the "direct and obvious effect of federal legislation on the ability of the States to allocate their resources."[36] Because ADEA lacked any obvious deleterious impact on state finances or on state social policies implicated by the game warden hiring system, the federal program did not indirectly impair a state's constitutionally protected decision-making prerogative.[37] Therefore, the tenth amendment did not preclude application of ADEA to state retirement programs for law enforcement personnel.

### C. *Justice Stevens' Concurrence*

Justice Stevens concurred in the result, but disagreed with the Court's reasoning.[38] Justice Stevens stated that the power provided by the commerce clause was sufficient to support federal statutes applying to both public and private employers.[39] It was upon this rationale, rather than the tenth amendment immunity approach, that he concurred with the Court's holding.[40] Justice Stevens characterized *National League of Cities* as "judicial fiat" deserving prompt rejection.[41]

### D. *Chief Justice Burger's Dissent*

The dissent by Chief Justice Burger[42] concluded that ADEA was unconstitutional as applied to the states.[43] The dissent applied the *National League of Cities/Hodel* analysis[44] and found that the statute involved satisfied

prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . ."

33. 103 S. Ct. at 1062.

34. *Id.*

35. *Id.* at 1062-64. *National League of Cities* recognized that courts must consider a federal statute's consequential effects on state decision-making in order to fully evaluate the degree of impairment resulting from application of the statute to a state. In *National League of Cities*, the Court specifically examined the extent to which financial consequential effects would seriously affect a state's ability to pursue its social and economic policies. 426 U.S. at 846-52.

36. 103 S. Ct. at 1063.

37. *Id.* at 1063-64.

38. *Id.* at 1065 (Stevens, J., concurring).

39. *Id.* at 1068.

40. *Id.*

41. *Id.* at 1067. Justice Stevens dissented in *National League of Cities*, and would have held the challenged statute to be a valid exercise of Congress' commerce power. 426 U.S. at 880-81 (Stevens, J., dissenting).

42. 103 S. Ct. at 1068 (Burger, C.J., dissenting). Justices Powell, Rehnquist, and O'Connor joined in Chief Justice Burger's dissent. *See id.* Justice Powell also wrote a separate dissent, joined only by Justice O'Connor. *See id.* at 1075 (Powell, J., dissenting).

43. *Id.* at 1068-69 (Burger, C.J., dissenting).

44. *Id.* at 1069. *See supra* notes 17-20 and accompanying text.

each of the requirements necessary to invoke tenth amendment immunity.[45] Disagreeing with the majority, the dissent argued strongly that ADEA substantially impaired Wyoming's ability to structure delivery of integral state services.[46] Chief Justice Burger observed that among the detrimental impacts were increased employment costs due to mandatory employment of older workers, limitations on a state's ability to hire those most physically able to do the job, and decreased promotional opportunities.[47] The dissent also rejected the conclusion that the nature of the federal interest justified state submission to the federal law, arguing that Wyoming was "setting standards to meet local needs," and that this interest reflected very real concerns for public safety outweighing any interest the federal government asserted.[48]

### E. *Justice Powell's Dissent*

In his separate dissent, Justice Powell chose to address Justice Stevens' view of the historical development of the commerce power, and hence the extent of political power inhering therein.[49] Justice Powell, expanding upon the history and the purposes of the Constitution, emphasized the importance of federalism as a constitutional principle[50] and criticized Justice Stevens' analysis, which implied that any state function could be preempted.[51]

### F. *Conclusion*

*EEOC v. Wyoming* is another example of the Supreme Court's obligation to balance federal and state interests.[52] *National League of Cities* articulated the concept of tenth amendment immunity, which provides an affirmative limitation on national powers by requiring judicial review of their effect upon state decision-making prerogatives.[53] In addition to states' rights concerns, federal statutes interfering with state decision-making affect certain individual rights to government services, especially in areas of public health and protection, providing another basis for invoking *National League of Cities* protections.[54] Although *EEOC v. Wyoming* did not find ADEA to be an infringement on the state prerogative protected by the tenth amendment, it is clear that the policies underlying *National League of Cities* will be implicated

45. 103 S. Ct. at 1072 (Burger, C.J., dissenting).
46. *Id.* at 1070.
47. *Id.* at 1070-71.
48. *Id.* at 1069.
49. *Id.* at 1075. (Powell, J., dissenting).
50. *Id.* at 1080.
51. *Id.* at 1081.
52. Other recent decisions involving state assertions of tenth amendment immunity include FERC v. Mississippi, 456 U.S. 742 (1982) and United Trans. Workers Union v. Long Island R.R., 455 U.S. 678 (1982). The propriety of Supreme Court balancing of federal and state prerogative remains a subject of some dispute. *Compare* Howard, *The States and the Supreme Court*, 31 CATH. U.L. REV. 375, 434 (1982) (court has legitimate role in balancing state and federal interests) *with* Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1600 (1977) (the national political branches should be relied upon for protecting the states' rights).
53. *See supra* notes 14-20 and accompanying text.
54. *See* Tribe, *Unraveling* National League of Cities: *The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1102 (1977).

in future challenges involving application of similar statutes to the states. The strong split in the Court regarding the scope of the tenth amendment's affirmative limitation on the exercise of congressional commerce power, and the problems in applying the test of immunity, indicate that *National League of Cities* will continue to breed controversy.

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